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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1031 98

JOHN W. ROXBOROUGH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

CHARLES H. HOUSTON,
Counsel for petitioner.

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JOHN W. ROXBOROUGH,

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THE PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John W. Roxborough, a Negro, prays for the issuance of a writ of Certiorari to review the decisions of the Supreme Court of the State of Michigan, in affirming on December 29, 1943, the judgment of the Circuit Court for the County of Wayne, in the State of Michigan, and in denying on February 24, 1944, petitioner's request for rehearing, in connection with certain criminal proceedings.

I.

Statement of the Case.

Petitioner, a Negro, was convicted in the Circuit Court for Wayne County, Michigan, upon an information filed against

him and 79 other identified persons charging them in Count One with conspiring together to aid, assist and enable the setting up or promotion, and management of lottery or gift enterprises, commonly known as policy, mutuel numbers and clearing houses (R. 20; and in Count Two with having conspired with and among themselves and others not named to procure the wilful, intentional and corrupt failure, omission, and neglect on the part of certain public officials in the County to perform their respective official duties, thereby permitting lotteries and gift enterprises to be set up, promoted, and conducted by defendants and their co-conspirators (R. 23).[1]

Two days before trial 4 defendants withdrew their pleas of "Not Guilty" and pleaded "Guilty" (R. 5) and 2 more defendants changed their pleas from "Not Guilty" to "Guilty" during the trial (R. 6, 8). 65 defendants, including petitioner, were tried jointly.[2] At the close of the people's case, 22 defendants were discharged on direct verdict (R. 9). Count One of the information was dismissed (R. 52), and the case submitted to the jury on Count Two against petitioner and 40 co-defendants (R. 11, 76). The jury returned a verdict of "Not Guilty" as to 18 defendants; "Guilty" as to 23 defendants, including petitioner (R. 11). Petitioner was sentenced to the State Prison for a term of 2½ to 5 years (R. 11).

The trial of the case began September 17, 1941 (R. 7).

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[1] Count Two is referred to throughout the proceedings as charging the obstruction of justice.

[2] The number of 65 defendants being placed on trial jointly is reached as follows:

Defendants changing pleas to "Guilty" during the trial	2
Defendants discharged on directed verdict	22
Defendants found not guilty	18
Defendants found guilty	23
Defendants placed on trial jointly	65

Approximately three weeks, until October 8, 1941, were consumed in selecting a jury (R. 7). The question in this case arises on petitioner's claim that he was there denied due process and the equal protection of the law by the prosecuting attorney's misuse of the 325 peremptory challenges available to the people in excluding from the jury more than 30 qualified Negro veniremen because of their race or color.

Section 17305, Michigan Compiled Laws of 1929, which governs the exercise of peremptory challenges in cases like the present, provides:

> "Any person who is put on trial for an offense which is not punishable by death or life imprisonment shall be allowed to challenge peremptorily five (5) of the persons drawn to serve as jurors and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily in such cases five (5) of such jurors and no more. In Cases involving two (2) or more defendants who are being jointly tried for such an offense, each of said defendants shall be allowed to challenge peremptorily five (5) persons returned as jurors and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily as many times five (5) of the persons returned as jurors as there may be defendants being so jointly tried."

Inasmuch as 65 defendants, including petitioner, were placed on trial jointly, the people had 325 peremptory challenges to petitioner's 5.

In selecting the jury, several jury panels totalling in all about 300 veniremen were practically exhausted. During this process it became apparent that the prosecuting attorney was misusing the 325 peremptory challenges available to the people (unconstitutionally, petitioner claims) in pursuance of a premeditated and studied plan to obtain a jury

of his own choosing and to bar all qualified Negro veniremen from serving on the jury solely because of race.[3]

More than 30 Negro veniremen presumptively qualified, upon being called to serve on the trial jury were immediately eliminated by peremptory challenge by the prosecuting attorney. His abuse in use of his peremptory challenges for purpose of hand-picking the jury and excluding all qualified Negro veniremen therefrom is reflected in the written motion for mistrial filed October 9, 1941 by 6 defendants, which is nowhere contradicted or controverted in the record. This motion *inter alia* states:[4]

" * * *

IV.

"Because the exercise of peremptory challenges in the selection of a jury by the prosecution was in pursuance of a premeditated and studied plan of procedure by the state to bar any Negro veniremen from serving on said jury and the carrying out of said plan and design was readily evidenced by the challenging of every Negro by the State and said discrimination was imparted by observation to the selected jury showing a definite bias towards members of the Negro race and resulting in irreparable injury to the defendants herein and particularly to those defendants who are members of the Negro race.

V.

"Because the tactics pursued by the prosecution as outlined in the preceding paragraph, are in direct con-

[3] The testimony concerning the selection of the jury was not preserved in the printed record, but the facts concerning the number of veniremen called, the exclusion of all Negroes from the jury were conceded in proceedings before the Michigan Supreme Court. (See opinion 307 Mich. 575, 588-590). Nor did the people ever deny or controvert the affidavit of John R. Williams, referred to *infra*, charging the prosecuting attorney with admitting he had purposely eliminated all Negroes called as jurors (R. 63).

[4] The record shows the number of Negro veniremen peremptorily challenged by the prosecuting attorney may have exceeded 40 (Certified original record, P. 2350 et seq.).

travention of the due process clause contained in Article 5 of the Bill of Rights of the Constitution of the United States of America and Section 16, Article 2 of the Constitution of the State of Michigan of 1908 and deprive the defendants of a fair and impartial trial by a jury of their peers; (see opinion of United States Supreme Court in the recent famous Scotsboro case).

"* * * *" (R. 124).

A motion for a new trial stressing *inter alia* the same violation of constitutional rights of defendants by the prosecuting attorney in summarily excluding all Negro veniremen was made by 4 defendants, supported by their respective affidavits (Certified original record, P. 2349 et seq.).

On February 18, 1942—after verdict but pending disposition of the motions for new trial filed—proof became available for the first time substantiating what was theretofore only strong suspicion; that the prosecuting attorney had used his peremptory challenges to exclude all qualified Negro veniremen from the jury solely because of their race or color. On that date petitioner obtained the affidavit of John R. Williams, editor of the Detroit edition of the Pittsburgh Courier, a Negro weekly newspaper, reporting a conference with the prosecuting attorney as follows:

"* * *.

"Q. Mr. O'Hara, how does it happen that you have continually for days excused only the Negro jurors who have been called for service in this case when many of them are without question as qualified as any of the others who have been called?

"A. The Roxborough-Watson interest are so wide that I prefer not to have any Negroes on the jury, and further practically every Negro in Detroit is a number or policy player anyhow, and as such is unfit to serve on a case involving such matters.

"* * *" (R. 62).

The very same day, February 18, 1942, petitioner filed his supplemental motion for a new trial alleging as well that his constitutional rights had been violated because of the exclusion by the prosecuting attorney of all qualified Negroes from the trial jury because of race, supporting said motion by the Williams affidavit (R. 60). The trial court considered, overruled the motion, and filed a written opinion (See par. 13, R. 73).

On appeal to the Michigan Supreme Court, in his Assignment of Error No. 23, petitioner assigned the prejudicial conduct of the prosecuting attorney in misusing this peremptory challenges and in striking every qualified Negro venireman as an invasion of his constitutional rights. (R. 35). He pressed the point in his brief. The Michigan Supreme Court specifically considered the question, dealt with it at length and held petitioner's rights had not been violated in the selection of the jury. (307 Mich., loc. cited, at pp. 588-594).

Application for rehearing repeating the claim of violation of petitioner's constitutional rights was duly submitted, and denied (R. 102-111). The Michigan Supreme Court thereafter stayed further proceedings in the case pending application to this Court for a writ of certiorari (R. 120).

Petitioner appends as Exhibit A to this petition his affidavit (Appdc 1) affirming that this application is made in good faith and not for delay, that he is innocent of the crime of which he has been convicted, that he has a valid and complete defense but his defense was not presented at the trial due to error in judgment on the part of his trial counsel in relying too heavily on petitioner's motion for a directed verdict and the insufficiency of the people's proofs.

II.

Question Presented.

Was petitioner deprived of due process and the equal protection of the law guaranteed him by Section 1 of the 14th Amendment to the Constitution of the United States, by the prosecuting attorney peremptorily challenging every qualified Negro venireman (upwards of 30) solely because of his race or color.

III.

Reasons for Allowance of the Writ.

1. The Michigan Supreme Court has considered and denied petitioner's claim of rights guaranteed him under the Constitution of the United States, 14th Amendment, Section 1, in sustaining the prosecuting attorney's use of his peremptory challenges in this case.

2. The Michigan Supreme Court considered the application of Section 17305, Compiled Laws of Michigan of 1929, to the facts of this case, decided against a claim of the application of said statute violating petitioner's right to due process and equal protection and decided in favor of its constitutionality.

3. The questions involved are of general public importance affecting the fundamental structure of jury trials, and are questions never directly passed upon by this Court.

4. The Michigan Supreme Court has decided herein a federal question of substance not determined by this Court, and its decision is not in accord with the line of decisions of this Court on the exclusion of qualified Negroes from jury service solely because of their race or color.

IV.

Prayer.

Wherefore petitioner, John W. Roxborough, prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of Michigan commanding the said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said court had in this cause numbered and entitled on its docket No. 42-085. The People of the State of Michigan, Plaintiff-Appellee v. John W. Roxborough, Defendant-Appellant, to the end that this cause may be reviewed and determined by this Court and that the judgment of the said Supreme Court of Michigan be reversed and for such further relief as this Court may deem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Supreme Court of Michigan is reported in 307 Mich. 575.

The opinion of the trial court in denying the motions made for a new trial is unreported, and appears in the record, pp. 64-78.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 344).

III.

Statement of Case.

A summary statement of the case has already been made in the Petition for a Writ of Certiorari under heading I, which is hereby adopted and made a part of this brief.

IV.

Specifications of Error and Summary of Argument.

The Michigan Supreme Court erred in holding that the misuse of the 325 peremptory challenges available to the people under Section 17305, Compiled Laws of 1929, by the prosecuting attorney in excluding all qualified Negro veniremen (more than 30) from the trial jury solely because of race or color, did not deprive petitioner of due process

and equal protection of the law as guaranteed him by Section 1, 14th Amendment to the Constitution of the United States.

Argument.

Due to the fact proof that the prosecuting attorney was using the 325 peremptory challenges available to the people to strike off every qualified Negro venireman solely because of race was not available to petitioner until February 18, 1942 when he obtained the Williams affidavit (R. 62), petitioner could not make his objections to the mispractice of the prosecuting attorney until after verdict and pending disposition of his motion already filed for a new trial (R. 58). But the very day he obtained the Williams affidavit he filed his supplemental motion for new trial "because of the prejudicial conduct of the prosecution in peremptorily discharging every Negro juror who was called to sit in the panel of jurors being selected to try this cause, when many of them were otherwise qualified. * * *" R. 61), supporting his motion by the Williams affidavit. It is true that petitioner's supplemental motion was inadvertently predicated on the 6th Amendment, instead of the 14th; but in the Michigan Supreme Court the constitutional objection was squarely bottomed on the 14th Amendment.

See Roxborough Brief, p. 46 Roxborough Answer Brief, p. 14.

The Michigan Supreme Court was not misled by the reference to the 6th Amendment, but considered the objections on their merits at length with regard to the 14th Amendment and decided the question against petitioner's claim of constitutional rights.

See opinion, 307 Mich., loc. cited, at pp. 588-594.

The people cannot claim surprise, or that the Williams affidavit was not foreshadowed by previous events occurring

in the trial. As the trial began, October 9, 1941, 6 co-defendants moved for a mistrial because of the prejudicial conduct of the prosecuting attorney in striking by peremptory challenge every Negro venireman (R. 123). 4 co-defendants January 14, 1942 filed their several motions for a new trial, urging *inter alia* the prejudicial conduct of the prosecuting attorney in striking every Negro venireman by preemptory challenge. (Certified original record, p. 2349 et seq.). These latter motions and affidavits in support thereof assert that the prosecuting attorney struck off more than 40 Negro veniremen by peremptory challenges (R. 123). These affidavits stand uncontradicted and uncontroverted on the record. They clearly show that the Williams affidavit is not to be classed as an afterthought, but is corroborated by the record in the cause.

At the time the 6 co-defendants made their motion for mistrial and the 4 co-defendants made their motions for a new trial, the misconduct of the prosecuting attorney was still matter of suspicion only. It was not until the Williams affidavit was obtained that the suspicion crystallized into fact.

Since the Michigan Supreme Court did consider and decide the constitutional question on its merits, waiving any objection as to timeliness, petitioner has his right of review in this Court,

Sully v. *Amer. Nat'l Bank*, 178 U. S. 289, 44 L. Ed. 1072,

even though the question was inexpertly drawn.

Cf. *Pyle* v. *Kansas*, 317 U. S. 213, 87 L. Ed. 214.

Likewise this Court is not bound by the finding of the Michigan Supreme Court as to the effect of the Williams affidavit (R. 62).

See 307 Mich., loc. cited, at p. 594.

Where the conclusion of law of a state court as to a federal right and its findings of fact are so intermingled that effective review requires this Court to inquire both into the facts and the law, this Court will re-examine the facts.

Norris v. *Alabama*, 294 U. S. 587, 589-590, 79 L. Ed. 1074.

The instant case and its companion case, the *Watson* case, 307 Mich. 596, are the only cases counsel has been able to find where it could be established that a Negro has been deprived of due process and the equal protection of the law by a persistent and extended abuse of peremptory challenges by the prosecuting attorney in the process of empaneling the trial jury. Usually the unconstitutional discrimination has been effected in the exclusion of Negroes from the panel or jury list. The Michigan Supreme Court in its opinion noted this distinction:

> "In the instant case we are solely concerned with the exercise of peremptory challenges by the people, and not with the selection of members of the jury by the jury commission, as was the situation in Norris v. Alabama, 294 U. S. 597, 79 Law Ed. 1074, and Hill v. Texas, 316 U. S. 400, 86 Law Ed. 1559, where showing was made that members of the Negro race were systematically excluded from the jury lists either by law or administrative practice." (307 Mich., loc. cited, at p. 590-1).

The Michigan Supreme Court relied on *Whitney* v. *State*, 43 Tex. Cr. 197, which involved but 3 peremptory challenges, and does not, therefore, meet the present issue where the state had 325 peremptory challenges. The real issue is suggested in *State* v. *Wilson*, 48 N. H. 398, where the court in upholding a Statute giving the State the right to 2 peremptory challenges said (399):

> "A very different question would be presented by a statute allowing the state *so many challenges as to give*

> *the state an unfair advantage over the respondent*, or to make it very difficult to obtain a jury at all." (Italics ours.)

The Michigan Supreme Court completely failed to appreciate that the action of the prosecuting attorney in this case amounted in substance to a revision of the jury panel by the prosecuting attorney expurgating all Negroes from the panel solely because of race, thru the power lodged in his hands by the 325 peremptory challenges allocated to the people by Section 17305 *supra*. The effect is exactly the same, so far as petitioner is concerned, as if the Negroes had never been included in the panel by the jury commissioners. From petitioner's standpoint the presence of Negroes on the jury panel was a mere pretense—a shadow without substance of right.

The moment of the unconstitutional discrimination is of no significance; the constitutional protection covers all steps thru the formation of the trial jury which is to sit and determine the case; and it is immaterial what state functionary has perpetrated the discrimination.

See *Ex parte Virginia*, 100 U. S. 313, 25 L. Ed. 667.

It is therefore our contention that where it is plainly established that all qualified Negro veniremen have been excluded from the trial jury solely because of race by the prosecuting attorney's taking advantage of a prodigal number of peremptory challenges available to him (here 325), petitioner has been deprived of due process and equal protection of the law under the 14th Amendment just as decisely as if Negroes had been excluded from the panel.

Norris v. *Alabama, supra.*

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in exclusion from jury

> service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised." Per Black J., in *Smith* v. *Texas*, 311 U. S. 126, 130, 85 L. Ed. 84.

This principle we contend for does not do violence to the basic principles underlying the use of peremptory challenges. For purposes of this argument we can concede the contention of the Michigan Supreme Court that the normal function of a peremptory challenge is to reject, rather than select; that its express purpose is to give a party freedom of rejection with the necessity of assigning cause.

We do not contend that even in the face of suspicion as strong and apparent as in the instant case the defense could have put the prosecuting attorney on the witness stand and catechized him on his use of his peremptory challenges in order to bring out that he was using same to exclude all qualified Negro veniremen solely because of race. Normally in such a situation the matter would be left; guilty but not proved. But we do most earnestly contend that if the defense is able to establish *aliunde* as a fact that the prosecuting attorney used a prodigal number of peremptory challenges to exclude every qualified Negro veniremen solely because of race, then his action is subject to the same constitutional objections as if the exclusion had been effected by jury commissioners in excluding Negroes from the panel altogether.

Petitioner does not contend he has a right to have Negroes sit on his jury, but he does have constitutional pro-

tection against them being totally excluded as a class solely because of their race or color.

Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839.
State v. *Peoples*, 131 N. C. 784, 42 S. E. 814.
State v. *Logan*, 341 Mo. 1164, 111 S. W. 2d 110.

The Williams affidavit cannot be brushed aside as lightly as the Michigan Supreme Court has treated it. The meeting between Williams and the prosecuting attorney was no chance contact. Williams, a newspaperman, makes oath that he had a conference with the prosecuting attorney, and the admissions of the prosecuting attorney were made in this conference. Suppose the prosecuting attorney had issued a formal statement to the Detroit dailies containing the same admission that he made to Williams: "that practically every Negro in Detroit is a number or policy player anyhow, and *as such is unfit to serve on a case involving such matters*". (R. 63; italics ours.) There is no doubt that such a statement would have been branded a libel on a race. By the census of 1940 there are 149,119 Negroes in Detroit.* The statement of the prosecutor has gone beyond individual censure and has smeared an entire race. Basically it is this belief that all, or practically all, Negroes in Detroit are number or policy players that moved him to strike all Negro veniremen by peremptory challenges. True, in his statement to Williams the prosecuting attorney asserts that "the Roxborough-Watson interest are so wide that I prefer not to have any Negroes on the jury". (We deny there is any Roxborough-Watson interest in the premises.) But the prosecuting attorney did not rest there; he proceeded to his basic reason that "further *practically every* Negro in Detroit is a number or policy player anyhow, and as such is *unfit* to serve on a case involving such

* Population Bulletin for Michigan (2nd Series), 16th Census.

matters'' (italics ours). In every case of exclusion of Negroes solely because of race or color the exclusion had its rationale in some supposed racial characteristic; instability, lack of reasoning power, personal repulsiveness, carriers of disease, inferior caste, etc. The basic point is that here the prosecuting attorney branded the Negro race in Detroit as a whole with being number or policy players, and struck them from the jury because of this ''racial'' trait.

The Williams affidavit stands on the record uncontradicted, uncontroverted, unexplained. This Court has repeatedly held that circumstances more faintly indicating racial discrimination than the Williams affidavit established a prima facie case, throwing on the people the burden of explanation.

> ''We thought (in Pierre *v.* Louisiana, 306 U. S. 354) as we think here that had there been evidence obtainable to contradict the inference to be drawn from this testimony, the State would not have refrained from introducing it.'' Per Stone, C. J., in Hill *v.* Texas, 316 U. S. 400, 405, 86 L. Ed. 1559.

On the record the conclusion is inescapable that the State thru its prosecuting attorney deliberately and arbitrarily excluded from the trial jury all qualified Negro veniremen solely because of race, and thru the 325 peremptory challenges available to it excluded all possibility of a qualified Negro sitting on this jury.

No amount of sophistry can distinguish the discrimination by jury commissioners in the exclusion of Negroes from jury lists, as in *Hill* v. *Texas*, *supra*, from the discrimination practised in this case. In neither case could any amount of effort by petitioner have possibly obtained a Negro juror. In the *Hill* case they never got on the list; in the instant case they were stricken as fast as they were

called by the prosecuting attorney pulling out one of his sheaf of 325 peremptory challenges.

It cannot be argued that there was any equality of footing between the people and petitioner with respect to the peremptory challenges, from the fact that defendants had in aggregate the same number (325) of peremptory challenges which the people had. Each defendant had but 5 peremptory challenges to be exercised independently by him. The information in its face shows how diverse and antagonistic the interests of the 65 defendants were; city officials, police officers, private citizens; represented by 16 different lawyers (R. 48). So far as petitioner is concerned he had 5 peremptory challenges. The people had its side of the scale loaded with 325 peremptory challenges. The prosecuting attorney was thus enabled to and did exclude arbitrarily all qualified Negro veniremen as a class solely because of their race or color. A more flagrant violation of petitioner's right to equal protection of the law as guaranteed him by Section 1 of the 14th Amendment could hardly be imagined.

Let us grant that a case like the instant case will seldom arise because of difficulties of proof. That, however, is no answer to the instant case where substantial and adequate proof has been made. Difficulty of proof must not be permitted to emasculate the fundamental law. The very novelty of the situation is reason enough for this Court to set its stamp of disapproval on the tactics used before they become established as an effective subterfuge for avoiding constitutional restraints.

> "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." Per Black, J., in *Smith* v. *Texas, supra,* at p. 132.

This overloading of the people with peremptory challenges where two or more defendants are jointly tried does

not have the sanction of immemorial custom in Michigan. From the time of the Revised Statutes of 1846 (sec. 58, ch. 103, secs. 3, 4, Ch. 165)* until 1927 the laws of Michigan gave the prosecuting attorney but 4 peremptory challenges regardless of the number of defendants being tried. In that year the present act was passed (Act 175, P. A. 1927) providing 5 peremptory challenges for each defendant, and as many times five as the number of defendants jointly tried for the people. As construed by the Michigan Supreme Court this statute represents a violent departure from the settled practice of 80 years or more.

Not only do we feel, therefore, that this new departure of pyramiding the peremptory challenges available to the people was never intended to apply to a trial of 65 defendants jointly, but we further believe that to apply it as the people did to this case cannot constitutionally be done. Inherently, it violates due process and equal protection of the law. In the ordinary case of a trial of 2, 3, or 5 defendants jointly the 10, 15, or 25 peremptory challenges available to the people under such circumstances might well be held not to violate constitutional safeguards, because the greatest advantage the people could have out of such situation would be the right to exclude a limited number of undesirables. But where the people had 325 peremptory challenges as it did here, it would have arbitrary, unrestricted and exclusive control over an indefinite number of jury panels, as here where 300 veniremen were called (R. 86). The jury would ultimately be the jury of the prosecution.

The State Supreme Court hurdled this point by simply stating that the function of peremptory challenges is to reject, not to select.

See, Roxborough opinion, 307 Mich., loc. cited, at p. 591.

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* See Appendix B.

The difference between rejection and selection is one of degree. Where the people can reject potentially every one of 300 veniremen called by use of the 325 peremptory challenges available to it, the right of rejection has swelled into an indirect power of selection. So far as petitioner's rights are concerned the jury which tried him was hand-picked by the prosecuting attorney. If as the Michigan Supreme Court states he used only about 100 of his 325 peremptory challenges, it was because he needed no more—all the undesirables, the Negroes, were by that margin already excluded.

Whether a state may or may not constitutionally modify trial by jury or the manner of the selection of the trial jury is not of present importance. What is important, however, is that if it does modify, the new method adopted must be fair and unbiased, and rest within constitutional limitations. A judicial system which requires an accused to be tried by a jury chosen by the prosecuting attorney, as was done in the instant case, is fundamentally deficient in that elemental justice which constitutes due process, or the law of the land.

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.' " Per Hughes, C. J., in *Brown* v. *Mississippi*, 297 U. S. 278, 285, 80 L. Ed. 682.

Conclusion.

Petitioner was convicted by a jury hand-picked by the prosecuting attorney thru his misuse of the 325 peremptory challenges made available to him by Section 17305, Michigan Compiled Laws of 1929. In addition this jury had the vice that every qualified Negro venireman had been excluded from it by the prosecuting attorney, acting for the people of

the State of Michigan, solely because of race or color. For both reasons his conviction was without due process of law and he was denied the equal protection of the laws as guaranteed him by Section 1 of the 14th Amendment to the Constitution of the United States.

We therefore pray that a writ of certiorari issue from this Court to the Supreme Court of the State of Michigan to review its affirmance of said conviction of petitioner by the Circuit Court for the County of Wayne, in the said State of Michigan, and said court's denial of his application for rehearing, and that the judgment of said Court be reversed on hearing and the cause remanded for further proceedings within the limitations of established constitutional restraints.

Respectfully submitted,

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APPENDIX A-1.

SUPREME COURT OF THE UNITED STATES.

No. —.

JOHN W. ROXBOROUGH, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF MICHIGAN, *Respondent.*

No. —.

EVERETT I. WATSON, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF MICHIGAN, *Respondent.*

AFFIDAVIT OF JOHN W. ROXBOROUGH.

STATE OF MICHIGAN,
County of Wayne, ss:

JOHN W. ROXBOROUGH, being first duly sworn, deposes and says that he is one of the petitioners above named, and that he was the defendant in that certain cause entitled "People of the State of Michigan, Plaintiff-Appellee, vs. John W. Roxborough, Defendant-Appelalnt," No. 42085, in the Supreme Court of the State of Michigan, for review of which the writ of certiorari in this cause is sought.

That said proceedings originated in the Circuit Court for the County of Wayne, in the State of Michigan, wherein deponent was convicted on a charge of conspiring to obstruct justice. That deponent firmly believes that the proofs adduced by the people at said trial (he not having taken the stand or put in any proofs on his own behalf, on advice of his then counsel) did not prove him guilty of the charge on which he was convicted, and that his conviction was a gross miscarriage of justice.

Deponent further says that he has a good and valid defense to said charge, and verily believes that he can prove his innocence beyond any question of a doubt. That although,

at said trial, deponent was willing and anxious to testify on his own behalf and could thereby have proven his unquestioned innocence, his counsel refused (mistakenly, deponent believes) to permit him to do so.

Deponent further says that this petition is prosecuted in good faith, and not for the purpose of delay, and that the proceedings in connection therewith have been prosecuted with all due dispatch.

JOHN W. ROXBOROUGH.

Subscribed and sworn to before me this 13 day of May, 1944.

WINIFRED CHIPMAN,
Notary Public, Wayne County, Mich.

My commission expires June 6, 1947.

APPENDIX B-1.

Mich. Sec. 58, ch. 103, Mich. Revised Statutes of 1846 traces its history through sec. 4400 Compiled Laws of 1857, sec. 6027 Compiled Laws of 1871 and sec. 10238 Compiled Laws of 1897 into sec. 14594 of Compiled Laws of 1915 which provides:

> "In all civil cases each party may challenge peremptorily four jurors, and in all prosecutions in the name of the people of this state, not otherwise especially provided for, the attorney appearing for the people may challenge four jurors peremptorily, and the defendant may challenge five persons peremptorily, but in all cases of challenges for cause, such cause shall be immediately assigned, and the truth thereof shall be determined by the court."

Under this section, each defendant, if several were jointly tried, had 5 peremptory challenges. *People v. Welmer*, 110 Mich. 248; *People v. Caruso*, 170 Mich. 138.

Sec. 4, ch. 165, Revised Statutes of 1846 traces its history through sec. 6071 Compiled Laws of 1857, sec. 7950 Com-

piled Laws of 1871 and sec. 11945 Compiled Laws of 1897 into sec. 15818 of Compiled Laws of 1915 which provides:

> "The attorney general, or any other officer prosecuting an indictment, shall be entitled to the same challenges on behalf of the people, that are allowed by law to parties in civil causes."

(2133)

(32)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1032 99

EVERETT I. WATSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

CHARLES H. HOUSTON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1032

EVERETT I. WATSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Everett I. Watson, a Negro, prays for the issuance of a writ of certiorari to review the decisions of the Supreme Court of the State of Michigan, in affirming on December 29, 1943, the judgment of the Circuit Court for the County of Wayne, in the State of Michigan, and in denying on February 24, 1944, petitioner's request for rehearing, in connection with certain criminal proceedings.

I.

Statement of the Case.

Petitioner, a Negro, was convicted in the Circuit Court for Wayne County, Michigan, upon an information filed against him and 79 other identified persons charging them

in Count One with conspiring together to aid, assist and enable the setting up or promotion, and management of lottery or gift enterprises, commonly known as policy, mutuel numbers and clearing houses (R. 20); and in Count Two with having conspired with and among themselves and others not named to procure the wilful, intentional and corrupt failure, omission, and neglect on the part of certain public officials in the County to perform their respective official duties, thereby permitting lotteries and gift enterprises to be set up, promoted, and conducted by defendants and their co-conspirators [1] (R. 23).

Two days before trial 4 defendants withdrew their pleas of "Not Guilty" and pleaded "Guilty" (R. 5), and 2 more defendants changed their pleas from "Not Guilty" to "Guilty" during the trial (R. 6, 8). 65 defendants, including petitioner, were tried jointly.[2] At the close of the people's case, 22 defendants were discharged on directed verdict (R. 9). Count One of the information was dismissed (R. 52), and the case submitted to the jury on Count Two against petitioner and 40 co-defendants (R. 11, 76). The jury returned a verdict of "Not Guilty" as to 18 defendants; "Guilty" as to 23 defendants, including petitioner (R. 11). Petitioner was sentenced to the State Prison for a term of 2½ to 5 years (R. 11).

The trial of the case began September 17, 1941 (R. 7). Approximately three weeks, until October 8, 1941, were con-

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[1] Count Two is referred to throughout the proceedings as charging the obstruction of justice.

[2] The number of 65 defendants being placed on trial jointly is reached as follows:

Defendants changing pleas to "Guilty" during the trial	2
Defendants discharged on directed verdict	22
Defendants found not guilty	18
Defendants found guilty	23
Defendants placed on trial jointly	65

sumed in selecting a jury (R. 7). The question in this case arises on petitioner's claim that he was there denied due process and the equal protection of the law by the prosecuting attorney's misuse of the 325 peremptory challenges available to the people in excluding from the jury more than 30 qualified Negro veniremen because of their race or color.

Section 17305, Michigan Compiled Laws of 1929, which governs the exercise of peremptory challenges in cases like the present, provides:

> "Any person who is put on trial for an offense which is not punishable by death or life imprisonment shall be allowed to challenge peremptorily five (5) of the persons drawn to serve as jurors and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily in such cases five (5) of such jurors and no more. In cases involving two (2) or more defendants who are being jointly tried for such an offense, each of said defendants shall be allowed to challenge peremptorily five (5) persons returned as jurors and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily as many times five (5) of the persons returned as jurors as there may be defendants being so jointly tried."

Inasmuch as 65 defendants, including petitioner, were placed on trial jointly, the people had 325 peremptory challenges to petitioner's 5.

In selecting the jury, several jury panels totalling in all about 300 veniremen were practically exhausted. During this process it became apparent that the prosecuting attorney was misusing the 325 peremptory challenges available to the people (unconstitutionally, petitioner claims) in pursuance of a premeditated and studied plan to obtain a jury of his own choosing and to bar all qualified Negro

veniremen from serving on the jury solely because of race.[3]

More than 30 Negro veniremen presumptively qualified,[4] upon being called to serve on the trial jury were immediately eliminated by peremptory challenge by the prosecuting attorney. His abuse in use of his peremptory challenges for purpose of hand-picking the jury and excluding all qualified Negro veniremen therefrom is reflected in the written motion for mistrial filed October 9, 1941 by 6 defendants, which is nowhere contradicted or controverted in the record. This motion *inter alia* states:

"

IV.

"Because the exercise of peremptory challenges in the selection of a jury by the prosecution was in pursuance of a premeditated and studied plan of procedure by the state to bar any Negro veniremen from serving on said jury and the carrying out of said plan and design was readily evidenced by the challenging of every Negro by the State and said discrimination was imparted by observation to the selected jury showing a definite bias towards members of the Negro race and resulting in irreparable injury to the defendants herein and particularly to those defendants who are members of the Negro race.

---

[3] The testimony concerning the selection of the jury was not preserved in the printed record, but the facts concerning the number of veniremen called, the exclusion of all Negroes from the jury were conceded in proceedings before the Michigan Supreme Court. (See opinion in companion case, *People* v. *Roxborough*, 307 Mich. 575, 588-590, which was adopted by reference by the Michigan Supreme Court in the instant case, *People* v. *Watson*, 307 Mich. 596, 609). Nor did the people ever deny or controvert the affidavit of John R. Williams, referred to *infra*, charging the prosecuting attorney with admitting he had purposely eliminated all Negroes called as jurors (R. 63).

[4] The record shows the number of Negro veniremen peremptorily challenged by the prosecuting attorney may have exceeded 40 (Certified original record, p. 2350 et seq.).

V.

"Because the tactics pursued by the prosecution as outlined in the preceding paragraph, are in direct contravention of the due process clause contained in Article 5 of the Bill of Rights of the Constitution of the United States of America and Section 16, Article 2 of the Constitution of the State of Michigan of 1908 and deprive the defendants of a fair and impartial trial by a jury of their peers; (see opinion of United States Supreme Court in the recent famous Scottsboro case).
"....." (R. 124.)

A motion for a new trial stressing *inter alia* the same violation of constitutional rights of defendants by the prosecuting attorney in summarily excluding all Negro veniremen was made by 4 defendants, supported by their respective affidavits (Certified oriignal record, P. 2349 et seq.).

On February 18, 1942—after verdict but pending disposition of the motions for new trial filed—proof became available for the first time substantiating what was theretofore only strong suspicion: that the prosecuting attorney had used his peremptory challenges to exclude all qualified Negro veniremen from the jury solely because of their race or color. On that date a co-defendant John W. Roxborough obtained the affidavit of John R. Williams, editor of the Detroit edition of the Pittsburgh Courier, a Negro weekly newspaper, reporting a conference with the prosecuting attorney as follows:

"* * *

"Q. 'Mr. O'Hara, how does it happen that you have continually for days excused only the Negro jurors who have been called for service in this case when many of them are without question as qualified as any of the others who have been called?'

"A. 'The Roxborough-Watson interests are so wide that I prefer not to have any Negroes on the jury, and further practically every Negro in Detroit is a number

or policy player anyhow, and as such is unfit to serve on a case involving such matters.'

"* * *." (R. 62.)

Roxborough the very same day, February 18, 1942, filed his supplemental motion for a new trial alleging as well that his constitutional rights had been violated because of the exclusion by the prosecuting attorney of all qualified Negroes from the trial jury because of race, supporting said motion by the Williams affidavit (R. 60). The trial court considered, overruled the motion, and filed a written opinion (see par. 13, R. 73).

On appeal to the Michigan Supreme Court, in his Assignment of Error No. 47, petitioner assigned the prejudicial conduct of the prosecuting attorney in misusing his peremptory challenges and in striking every qualified Negro venireman as an invasion of his constitutional rights (R. 43). He pressed the point in his brief. The Michigan Supreme Court specifically considered the question, dealt with it at length in its opinion in the *Roxborough* case (307 Mich., loc. cited, at pp. 588-594) and incorporated the *Roxborough* opinion by reference in petitioner's case (307 Mich., loc. cited, at p. 609). The Court held petitioner's rights had not been violated in the selection of the jury (307 Mich., loc. cited, at p. 593).

Application for rehearing repeating the claim of violation of petitioner's constitutional rights was duly submitted, and denied (R. 111-119). The Michigan Supreme Court thereafter stayed further proceedings in the case pending application to this Court for a writ of certiorari (R. 120).

Petitioner appends as Exhibit A to this petition his affidavit (Appdx. 1) affirming that this application is made in good faith and not for delay, that he is innocent of the crime of which he has been convicted, that he has a valid and complete defense but his defense was not presented at

the trial due to error in judgment on the part of his trial counsel in relying too heavily on petitioner's motion for a directed verdict and the insufficiency of the people's proofs.

II.

Question Presented.

Was petitioner deprived of due process and the equal protection of the law guaranteed him by Section 1 of the 14th Amendment to the Constitution of the United States, by the prosecuting attorney peremptorily challenging every qualified Negro venireman (upwards of 30) solely because of his race or color?

III.

Reasons for Allowance of the Writ.

1. The Michigan Supreme Court has considered and denied petitioner's claim of rights guaranteed him under the Constitution of the United States, 14th Amendment, Section 1, in sustaining the prosecuting attorney's use of his peremptory challenges in this case.

2. The Michigan Supreme Court considered the application of Section 17305, Compiled Laws of Michigan of 1929, to the facts of this case, decided against a claim of the application of said statute violating petitioner's right to due process and equal protection, and decided in favor of its constitutionality.

3. The questions involved are of general public importance affecting the fundamental structure of jury trials, and are questions never directly passed upon by this Court.

4. The Michigan Supreme Court has decided herein a Federal question of substance not determined by this Court,

and its decision is not in accord with the line of decisions of this Court on the exclusion of qualified Negroes from jury service solely because of their race or color.

IV.

Prayer.

WHEREFORE petitioner Everett I. Watson prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of Michigan commanding the said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said court had in this cause numbered and entitled on its docket No. 42-089, The People of the State of Michigan, Plaintiff-Appellee *v.* Everett I. Watson, Defendant-Appellant, to the end that this cause may be reviewed and determined by this Court and that the judgment of the said Supreme Court of Michigan be reversed and for such further relief as this Court may deem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Supreme Court of Michigan is reported in 307 Mich. 596, and incorporates by reference the opinion in a companion case, *People* v. *Roxborough*, 307 Mich. 575.

The opinion of the trial court in denying the motions made for a new trial is unreported, and appears in the record, pp. 64-78.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 344).

III.

Statement of Case.

A summary statement of the case has already been made in the Petition for a Writ of Certiorari under heading I, which is hereby adopted and made a part of this brief.

IV.

Specifications of Error and Summary of Argument.

The Michigan Supreme Court erred in holding that the misuse of the 325 peremptory challenges available to the people under Section 17305, Compiled Laws of 1929, by the prosecuting attorney in excluding all qualified Negro veniremen (more than 30) from the trial jury solely because of race or color, did not deprive petitioner of due process and

equal protection of the law as guaranteed him by Section 1, 14th Amendment to the Constitution of the United States.

Argument.

At the outset we face the apparent difficulty that the record does not show that the objections of petitioner to the misuse of the 325 peremptory challenges available to the people by the prosecuting attorney were raised in the trial court, but it does show that they were raised on appeal to the Michigan Supreme Court although mistakenly based on the 6th Amendment instead of the 14th Amendment to the Constitution of the United States.

See petitioner's Assignment of Errors, No. 47 (R. 43).

The record does show moreover that there were objections to the procedure and practice of the prosecuting attorney in the use of his peremptory challenges raised early before the trial court by Motion for Mistrial filed by 6 co-defendants as the trial began (R.), by Motions for New Trial filed by 4 co-defendants (R.), and by Supplemental Motion for New Trial filed by petitioner's co-defendant Roxborough, supported by the Williams affidavit (R. 60). It is true that the Roxborough supplemental motion was inadvertently predicated on the 6th Amendment instead of the 14th; but in the Michigan Supreme Court the constitutional objection was squarely bottomed on the 14th Amendment.

See Roxborough Brief, p. 46; Roxborough Answer Brief, p. 14.

The Michigan Supreme Court was not misled by the references to the 6th Amendment, but considered and decided the case with reference to the 14th Amendment.

See opinion in *People* v. *Roxborough, supra,* 307 Mich. 575, 588, 594; incorporated in the opinion of the court in the instant case, 307 Mich. at 609.

It considered the objections on their merits and decided the question against the claim of constitutional rights.

See opinions cited *supra*.

Since the Michigan Supreme Court did consider and decided the constitutional question on its merits, petitioner has his right of review in this Court,

Sully v. *American Natl. Bk.*, 178 U. S. 289, 44 L. ed. 1072

even though the question was inexpertly drawn.

Cf. *Pyle* v. *Kansas*, 317 U. S. 213, 87 L. ed. 214.

Likewise this Court is not bound by the finding of the Michigan Supreme Court as to the effect of the Williams affidavit (R. 62).

See 307 Mich., loc. cited, at p. 594.

Where the conclusion of law of a State court as to a Federal right and its findings of fact are so intermingled that effective review requires this Court to inquire into both the facts and the law, this Court will reexamine the facts.

Norris v. *Alabama*, 294 U. S. 587, 589-590, 79 L. ed. 1074.

The instant case and its companion case, the *Roxborough* case, are the only cases counsel has been able to find where it could be established that a Negro has been deprived of due process and the equal protection of the law by a persistent and extended abuse of peremptory challenges by the prosecuting attorney in the process of empaneling the trial jury. Usually the unconstitutional discrimination has been effected in the exclusion of Negroes from the panel or jury list. The Michigan Supreme Court in the *Roxborough* opinion noted this distinction:

> "In the instant case we are solely concerned with the exercise of peremptory challenges by the people, and not with the selection of members of the jury by the

> jury commission, as was the situation in Norris *v.* Alabama, 294 U. S. 587, 79 Law Ed. 1074, and Hill *v.* Texas, 316 U. S. 400, 86 Law Ed. 1559, where showing was made that members of the Negro race were systematically excluded from the jury lists either by law or administrative practice." (307 Mich., loc. cited, at p. 590-1).

The Michigan Supreme Court, however, completely failed to appreciate that the action of the prosecuting attorney in this case amounted in substance to a revision of the jury panel by the prosecuting attorney expurgating all Negroes from the panel solely because of race, through the power lodged in his hands by the 325 peremptory challenges allocated to the people by Section 17305 *supra*. The effect is exactly the same, so far as petitioner is concerned, as if the Negroes had never been included in the panel by the jury commissioners. From petitioner's standpoint the presence of Negroes on the jury panel was a mere pretense—a shadow, without substance of right.

The moment of the unconstitutional discrimination is of no significance; the constitutional protection covers all steps through the formation of the trial jury which is to sit and determine the case; and it is immaterial what state functionary has perpetrated the discrimination.

See *Ex Parte Virginia*, 100 U. S. 313, 25 L. ed. 667.

It is therefore our contention that where it is plainly established that all qualified Negro veniremen have been excluded from the trial jury solely because of race by the prosecuting attorney's taking advantage of a prodigal number of peremptory challenges available to him (here 325), petitioner has been deprived of due process and equal protection of the law under the 14th Amendment just as decisively as if Negroes had been excluded from the panel.

Norris v. *Alabama, supra:*

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised." Per Black, J., in Smith *v.* Texas, 311 U. S. 128, 130, 85 L. ed. 84.

This principle we contend for does not do violence to the basic principles underlying the use of peremptory challenges. For purposes of this argument we can concede the contention of the Michigan Supreme Court that the normal function of a peremptory challenge is to reject, rather than select; that its express purpose is to give a party freedom of rejection with the necessity of assigning cause.

We do not contend that even in the face of suspicion as strong and apparent as in the instant case the defense could have put the prosecuting attorney on the witness stand and catechized him on his use of his peremptory challenges in order to bring out that he was using same to exclude all qualified Negro veniremen solely because of race. Normally in such a situation the matter would be left: guilty but not proved. But we do most earnestly contend that if the defense is able to establish *aliunde* as a fact that the prosecuting attorney used a prodigal number of peremptory challenges to exclude every qualified Negro venireman solely because of race, then his action is subject to the same constitutional objections as if the exclusion had been effected by jury commissioners in excluding Negroes from the panel altogether.

Petitioner does not contend he has a right to have Negroes sit on his jury, but he does have constitutional protection against their being totally excluded as a class solely because of the race or color.

Carter v. *Texas,* 177 U. S. 442, 44 L. Ed. 839;
State v. *Peoples,* 131 N. C. 784, 42 S. E. 814;
State v. *Logan,* 341 Mo. 1164, 111 S. W. 2d 110.

The Williams affidavit cannot be brushed aside as lightly as the Michigan Supreme Court has treated it. The meeting between Williams and the prosecuting attorney was no chance contact. Williams, a newspaper man, makes oath that he had a conference with the prosecuting attorney, and the admissions of the prosecuting attorney were made in this conference. Suppose the prosecuting attorney had issued a formal statement to the Detroit dailies containing the same admission that he made to Williams: that "practically every Negro in Detroit is a number or policy player anyhow, and *as such is unfit to serve on a case involving such matters*" (R. 63; italics ours). There is no doubt that such a statement would have been branded a libel on a race. By the Census of 1940 there are 149,119 Negroes in Detroit.* The statement of the prosecutor has gone beyond individual censure and has smeared an entire race. Basically it is this belief that all, or practically all, Negroes in Detroit are number or policy players that moved him to strike all Negro veniremen by peremptory challenges. True, in his statement to Williams the prosecuting attorney asserts that "the Roxborough-Watson interests are so wide that I prefer not to have any Negroes on the jury." (We deny there is any Roxborough-Watson interest in the premises.) But the prosecuting attorney did not rest there; he proceeded to his basic reason that "further *practically every* Negro in Detroit is a number or policy player any-

* Population Bulletin for Michigan (2nd Series), 16th Census.

how, and as such is *unfit* to serve on a case involving such matters" (italics ours). In every case of exclusion of Negroes solely because of race or color the exclusion had its rationale in some supposed racial characteristic: instability, lack of reasoning power, personal repulsiveness, carriers of disease, inferior caste, etc. The basic point is that here the prosecuting attorney branded the Negro race in Detroit as a whole with being number or policy players, and struck them from the jury because of this "racial" trait.

The Williams affidavit stands on the record uncontradicted, uncontroverted, unexplained. This Court has repeatedly held that circumstances more faintly indicating racial discrimination than the Williams affidavit established a prima facie case, throwing on the people the burden of explanation.

> "We thought (in Pierre *v.* Louisiana, 306 U. S. 354) as we think here that had there been evidence obtainable to contradict the inference to be drawn from this testimony, the State would not have refrained from introducing it." Per Stone, C. J., in *Hill* v. *Texas,* 316 U. S. 400, 405, 86 L. Ed. 1559.

On the record the conclusion is inescapable that the State through its prosecuting attorney deliberately and arbitrarily excluded from the trial jury all qualified Negro veniremen solely because of race, and through the 325 peremptory challenges available to it excluded all possibility of a qualified Negro sitting on this jury.

No amount of sophistry can distinguish the discrimination by jury commissioners in the exclusion of Negroes from jury lists, as in *Hill* v. *Texas, supra,* from the discrimination practiced in this case. In neither case could any amount of effort by petitioner have possibly obtained a Negro juror. In the *Hill* case they never got on the list; in the instant case they were stricken as fast as they were called by the

prosecuting attorney pulling out one of his sheaf of 325 peremptory challenges.

It cannot be argued that there was any equality of footing between the people and petitioner with respect to the peremptory challenges, from the fact that defendants had in aggregate the same number (325) of peremptory challenges which the people had. Each defendant had but 5 peremptory challenges to be exercised independently by him. The information on its face shows how diverse and antagonistic the interests of the 65 defendants were: city officials, police officers, private citizens; represented by 16 different lawyers (R. 48). So far as petitioner is concerned he had 5 peremptory challenges while the people had its side of the scale loaded with 325 peremptory challenges. The prosecuting attorney was thus enabled to and did exclude arbitrarily all qualified Negro veniremen as a class solely because of their race or color. A more flagrant violation of petitioner's right to equal protection of the law as guaranteed him by Section 1 of the 14th Amendment could hardly be imagined.

Let us grant that a case like the instant case will seldom arise because of difficulties of proof. That, however, is no answer to the instant case where substantial and adequate proof has been made. Difficulty of proof must not be permitted to emasculate the fundamental law. The very novelty of the situation is reason enough for this Court to set its stamp of disapproval on the tactics used before they become established as an effective subterfuge for avoiding constitutional restraints.

> "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." Per Black, J., in Smith *v.* Texas, *supra*, at p. 132.

This overloading of the people with peremptory challenges where two or more defendants are jointly tried does

not have the sanction of immemorial custom in Michigan. From the time of the Revised Statutes of 1846 (sec. 58, ch. 103, secs. 3, 4, ch. 165)* until 1927 the laws of Michigan gave the prosecuting attorney but 4 peremptory challenges regardless of the number of defendants being tried. In that year the present act was passed (Act 175, P. A. 1927) providing 5 peremptory challenges for each defendant, and as many times five as the number of defendants jointly tried for the people. As construed by the Michigan Supreme Court this statute represents a violent departure from the settled practice of 80 years or more.

Not only do we feel, therefore, that this new departure of pyramiding the peremptory challenges available to the people was never intended to apply to a trial of 65 defendants jointly, but we further believe that to apply it as the people did to this case cannot constitutionally be done. Inherently, it violates due process and equal protection of the law. In the ordinary case of a trial of 2, 3, or 5 defendants jointly the 10, 15 or 25 peremptory challenges available to the people under such circumstances might well be held not to violate constitutional safeguards, because the greatest advantage the people could have out of such situation would be the right to exclude a limited number of undesirables. But where the people had 325 peremptory challenges as it did here, it would have arbitrary, unrestricted and exclusive control over an indefinite number of jury panels, as here where 300 veniremen were called (R. 86). The jury would ultimately be the jury of the prosecution.

The State Supreme Court hurdled this point by simply stating that the function of peremptory challenges is to reject, not to select.

See Roxborough opinion, 307 Mich., loc. cited, at p. 591.

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* See Appendix B.

The difference between rejection and selection is one of degree. Where the people can reject potentially every one of 300 veniremen called by use of the 325 peremptory challenges available to it, the right of rejection has swelled into an indirect power of selection. So far as petitioner's rights are concerned the jury which tried him was hand-picked by the prosecuting attorney. If as the Michigan Supreme Court states he used only about 100 of his 325 peremptory challenges, it was because he needed no more—all the undesirables, the Negroes, were by that margin already excluded.

Whether a state may or may not constitutionally modify trial by jury or the manner of the selection of the trial jury is not of present importance. What is important, however, is that if it does modify, the new method adopted must be fair and unbiased, and rest within constitutional limitations. A judicial system which requires an accused to be tried by a jury chosen by the prosecuting attorney, as was done in the instant case, is fundamentally deficient in that elemental justice which constitutes due process, or the law of the land.

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Per Hughes, C. J., in Brown v. Mississippi, 297 U. S. 278, 285, 80 L. ed. 682.

Conclusion.

Petitioner was convicted by a jury hand-picked by the prosecuting attorney thru his misuse of the 325 peremptory challenges made available to him by Section 17305, Michigan Compiled Laws of 1929. In addition this jury had the vice that every qualified Negro venireman had been excluded from it by the prosecuting attorney, acting for the people

of the State of Michigan, solely because of race or color. For both reasons his conviction was without due process of law and he was denied the equal protection of the laws as guaranteed him by Section 1 of the 14th Amendment to the Constitution of the United States.

We therefore pray that a writ of certiorari issue from this Court to the Supreme Court of the State of Michigan to review its affirmance of said conviction of petitioner by the Circuit Court for the County of Wayne, in the said State of Michigan, and said court's denial of his application for rehearing, and that the judgment of said Court be reversed on hearing and the cause remanded for further proceedings within the limitations of established constitutional restraints.

Respectfully submitted,

CHARLES H. HOUSTON,
Attorney for Petitioner.

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Washington, D. C.

APPENDIX A.

SUPREME COURT OF THE UNITED STATES.

No. —.

JOHN W. ROXBOROUGH, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF MICHIGAN, *Respondent.*

No. —.

EVERETT I. WATSON, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF MICHIGAN, *Respondent.*

Affidavit of Everett I. Watson.

STATE OF MICHIGAN,
County of Wayne, ss:

EVERETT I. WATSON, being first duly sworn, deposes and says that he is one of the petitioners above named, and that he was the defendant in that certain cause, entitled "People of the State of Michigan, Plaintiff-Appellee, vs. Everett I. Watson, Defendant-Appellant," No. — in the Supreme Court of the State of Michigan, for review of which the writ of certiorari in this cause is sought.

That said proceedings originated in the Circuit Court for the County of Wayne, in the State of Michigan, wherein deponent was convicted on a charge of conspiring to obstruct justice. That deponent firmly believes that the proofs adduced by the people at said trial (he not having taken the stand on his own behalf on advice of his then counsel) did not prove him guilty of the charge on which he was convicted, and that his conviction was a gross miscarriage of justice.

Deponent further says that he has a good and valid defense to said charge, and verily believes that he can prove his innocence beyond any question of a doubt. That al-

though, at said trial, deponent was willing and anxious to testify in his own behalf and could thereby have proven his unquestioned innocence, his counsel refused (mistakenly, deponent believes) to permit him to do so.

Deponent further says that this petition is prosecuted in good faith and not for the purpose of delay, and that the proceedings in connection therewith have been prosecuted with all due dispatch.

EVERETT I. WATSON.

Subscribed and sworn to before me this 13 day of May, 1944.

WINIFRED CHIPMAN,
Notary Public, Wayne County, Mich.

My commission expires June 6, 1947.

APPENDIX B.

Sec. 58, ch. 103, Mich. Revised Statutes of 1846 traces its history through sec. 4400 Compiled Laws of 1857, sec. 6027 Compiled Laws of 1871 and sec. 10238 Compiled Laws of 1897 into sec. 14594 of Compiled Laws of 1915 which provides:

> "In all civil cases each party may challenge peremptorily four jurors, and in all prosecutions in the name of the people of this state, not otherwise especially provided for, the attorney appearing for the people may challenge four jurors peremptorily, and the defendant may challenge five persons peremptorily, but in all cases of challenges for cause, such cause shall be immediately assigned, and the truth thereof shall be determined by the court."

Under this section, each defendant, if several were jointly tried, had 5 peremptory challenges. *People v. Welmer*, 110 Mich. 248; *People v. Caruso*, 170 Mich. 138.

Sec. 4, ch. 165, Revised Statutes of 1846 traces its history through sec. 6071 Compiled Laws of 1857, sec. 7950 Com-

piled Laws of 1871, and sec. 11945 Compiled Laws of 1897 into sec. 15818 of Compiled Laws of 1915 which provides:

> "The attorney general, or any other officer prosecuting an indictment, shall be entitled to the same challenges on behalf of the people, that are allowed by law to parties in civil causes."

(33)

In the Supreme Court of the United States

October Term 1944

No. 98

No. 99

JOHN W. ROXBOROUGH,
EVERETT I. WATSON,
Petitioners,

v.

THE PEOPLE OF THE STATE OF MICHIGAN

Respondent's Brief Opposing Petitions for Writs of Certiorari to Supreme Court of the State of Michigan.

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Edmund E. Shepherd
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(*Of Counsel,* on the Brief)

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No. 99

JOHN W. ROXBOROUGH,
EVERETT I. WATSON,
Petitioners,

v.

THE PEOPLE OF THE STATE OF MICHIGAN

Respondent's Brief Opposing Petitions for Writs of Certiorari to Supreme Court of the State of Michigan.

Respondent's Brief Opposing Petition for Certiorari.[1]

I

Opinions of the Courts Below

Counsel has supplied the correct citation to the official report of the opinions of the court below, both in No. 98 (People v. Roxborough, 307 Mich. 575) and in No. 99 (People v. Watson, 307 Mich. 596), but attention should

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[1]
Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed 'Transcript of Record'.

be directed as well to other companion cases decided the same date, and based upon the same record:

People v. Ryan, 307 Mich. 610,
People v. Reading, 307 Mich. 616,
People v. Ryckman, 307 Mich. 631.

II

Jurisdiction.

It is said the jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USC, § 344).[2]

III

Objections to Affidavits.

We record on the threshold our objections to inclusion in each petition and brief, of a certain document[3] which might be termed an 'affidavit of merits', reciting that the deponent 'firmly believes that the proofs adduced by the people at said trial (he not having taken the stand or put in any proofs on his own behalf, on ad-

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[2]

Whether such a short statement (p. 9 of each petition) constitutes full compliance with Revised Rule 12, we do not venture to say, leaving the matter to judicial discretion.

[3]

No. 98, Appendix A-1, pp. 21-22;
No. 99, Appendix A, pp. 20-21.

vice of his then counsel) did not prove him guilty of the charge on which he was convicted, and that his conviction was a gross miscarriage of justice'.

Each petitioner professes to have 'a good and valid defense' and strong faith in his ability to prove his innocence 'beyond any question of doubt'; and 'while willing and anxious to testify in his own behalf' at the trial, his then counsel (mistakenly) refused to permit him to do so.

The state supreme court found (80-82) upon review of the voluminous record in No. 98, that 'the testimony of the various witnesses presented questions of fact for consideration by the jury and the record contains sufficient testimony from which the jury could find Roxborough guilty as charged' (82).

In No. 99, counsel did not press the question involving weight of the evidence, but merely urged that proof of venue had not been established (Watson main brief, pp. 100-115), and the court below did not discuss the general question of sufficiency of proof (93-100).

Were such affidavits as we find here, designed merely to support applications for stays of the proceedings below, they might be in order to show good faith, but we find no authority for their inclusion otherwise, and, since questions of fact may not ordinarily be resolved in certiorari proceedings, we are puzzled to know why they were filed. We respectfully submit they should be stricken.

IV

Counter-Statement of Case.

With the exceptions presently noted, supplying omissions and correcting inaccuracies (Rule 27-4), we accept each petitioner's 'Statement of Case'.

It should be observed at the outset, in fairness to the State of Michigan, that certain negro defendants as well as white ones, charged in the information, were acquitted (74). [4]

First: We might, for sake of further clarity, add to counsel's careful summary of Count Two of the information (23-27), the statement that those charged with conspiracy therein, included many among whom the following were alleged to have played these roles:

1. **Duncan C. McCrea,** prosecuting attorney of Wayne county, accused of having conspired to accept bribes; [5]

2. **Richard W. Reading,** mayor of the city of Detroit, charged as such and duly convicted of conspiring to obtain bribes for the protection of those illegally

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[4]
The statement of the trial judge (73-74) to this effect has not been challenged.

[5]
While not put to trial in this cause, McCrea had been tried and convicted of a similar and connected offense. Affirmed, 303 Mich. 213; certiorari denied, 318 U. S. 783.

engaged in the promotion, management, etc., of lottery or gift enterprises for money, commonly known as 'policy' or 'numbers' (conviction affirmed, 307 Mich. 616);

3. **John P. McCarthy,**
Arthur Ryckman, *et al.,* police officers of the city of Detroit, charged and convicted of such conspiracy (affirmed, 307 Mich. 631);

4. **Elmer Ryan,** the proprietor of such a lottery or gift enterprise, charged and convicted of conspiracy to corrupt the aforesaid public officials (affirmed, 307 Mich. 610);

6. **John W. Roxborough (No. 98),**
Everett I. Watson (No. 99), *et al.,* proprietors of such lottery or gift enterprises, also charged and convicted of conspiracy to corrupt these public officials.

Roxborough (No. 98) and Watson (No. 99) alone seek certiorari to review the judgment of the supreme court of the State of Michigan.

Second: It is important, we think, clearly to understand 'the state in the proceedings in the court of first instance . . . . . at which, and the manner in which, the federal questions sought to be reviewed here were raised' (Rule 12).

1. There is nothing in the transcript of record, or in the certified original record, to indicate that during the three weeks in which the trial jury was chosen, and the peremptory challenges were interposed by the prosecu-

tion, any objections to the procedure were raised by counsel for these petitioners, on the ground that they were denied due process or equal protection of the law, or, for that matter, on any other ground, nor did counsel deem it of sufficient importance to include in the settled record any of the voir dire examination. [6]

2. The question involving peremptory challenges was first raised when, on the 9th day of October 1941, the trial having been in progress two days (7-8), the defendants Arthur Ryckman and five other respondents (not negroes) filed a 'Motion for Mistrial' (123) in their own behalf, on the ground, among several others, that 'the exercise of peremptory challenges in the selection of a jury by the prosecution was in pursuance of a premeditated and studied plan of procedure by the state to bar any negro venireman from serving on said jury', and that such procedure 'resulted in irreparable jury to the defendants herein and particularly to those defendants who are members of the negro race' (124).

The defendants who raised such objections were not negroes, and the certified original record (126-129) does not disclose that petitioners' counsel, who did represent negroes, joined therein, or that they filed a similar motion for mistrial. But it does show that, at the same time, petitioners' counsel stressed a quite different point, and based their objections on the opening statement of the special assistant prosecuting attorney (121-123).

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[6]

It may be noted that the petitioners do not claim that they were represented by incompetent counsel; and the certified original record shows that such counsel were most diligent in advocating their cause.

3. Counsel does not state, in either petition, that the prosecutor, in making his opening statement (49-50), said:

> "And, incidentally, in this case, we are going to present to you the facts, the cold facts, as the witnesses understand them, and I will say to you now, a lot of you sat on this jury for a long time watching the selection of this jury, please at no time draw the color line, and don't (49) think that we do. We are here to present this case purely and simply on the facts and if we prove it beyond a reasonable doubt, you have a certain duty to perform and if we don't, you have another duty to perform. But don't misunderstand the situation which you have watched day in and day out as you sat in this jury box and don't draw the color line for one single second against a single defendant sitting out there in that audience. We want this case to be decided on the facts. If they are guilty, we want justice done to them, and if they are not guilty, we want them out on the street walking around" (50).

Whereupon, counsel representing certain of the petitioners, objected to the remarks on the ground that they were argumentative, and the prosecuting attorney pursued the matter no further (50).

4. At the close of the people's proofs (certified original record, 1386), counsel for Watson (No. 99) moved for a directed verdict on several grounds, but, though opportunity was available, he did not urge the point now presented (50-51); and at the same time, counsel for Roxborough (No. 98) made much the same motion (51-

52), but without mentioning the subject of peremptory challenges.

5. Nor does the petition for Roxborough (No. 98), or Watson (No. 99), disclose that the prosecuting attorney stated, in his argument to the jury, as follows (53):

> "And I repeat to you what I have said in my opening statement, two months and four days ago, let no man be convicted because of race or color or creed. Take each man, put him along side of the other fellow and judge his case, and whether he is a black man or a white man, if you think he isn't guilty, acquit him. And you will never hear me say anything".

Or that the trial judge, when instructing the jury, said (53):

> "Justice knows no favorites and shows no partiality. It makes no distinction because of race or color and it draws no line of demarcation between the rich and the poor. Its purpose is to render unto every man that which he justly deserves".

6. The jury's verdict was rendered on the 15th day of December 1941 (57), and, on the 14th day of January 1942, the defendants Arthur Ryckman *et al.* filed a motion for new trial (certified original record, 2354-2356), assigning as error the trial court's denial of their motion for mistrial on the ground that the prosecuting attorney, in exercising his peremptory challenges against every negro venireman, had violated constitutional principles.

On the same day, petitioner Watson (No. 99), through his counsel, filed a motion for new trial (63-64), but he did not see fit to raise the federal question.

Roxborough's (No. 98) motion for new trial (58-60) is also dated the 14th day of January 1942 (60), but it does not appear to have been filed until the 19th day of February 1942 (58). Counsel did not raise the question involving peremptory challenges at this time.

Finally, on the 19th day of February 1942, counsel for Roxborough filed his supplemental motion for new trial (60-63) in which, for the first time, he raised the question now presented, based on the affidavit of a newspaperman, one John R. Williams (62-63).

Watson (No. 99) does not appear to have taken this step, and, so far as the records disclose, he did not see fit to do so until he appealed to the state supreme court, when he assigned the matter as error (assignment No. 47, at the very close of such assignments [43]).

V

Questions Presented.

On the basis of the record, the 'Question Presented', as stated by petitioners' counsel, is founded on a faulty premise, and is over-simplified.

As we view it, the question, so defined, divides, and may be restated as follows:

1. Should this Court, in their discretion, issue a writ of certiorari to consider a federal question which (although examined and decided by the highest state court) was not raised by the petitioner Roxborough (No. 98) in the trial court until he filed a supplemental motion for new trial, and which was never raised by the petitioner Watson (No. 99) in the court of first instance, it further appearing that the trial on a charge of conspiracy involving the negro petitioners with several prominent white public officials (who were also convicted), pursued its course for upwards of two months, without objection or exception on petitioners' behalf to the peremptory challenges of the prosecution?

2. Does the supporting affidavit of John R. Williams, attached to Roxborough's supplemental motion for new trial (62) in No. 98, firmly establish the fact that the prosecuting attorney deliberately challenged every qualified negro venireman '*solely* because of his race or color'?

3. Is there any substance in the claim that each of the petitioners was deprived of due process and that he was denied equal protection of the law (14th Amendment, § 1) by means of the statutory peremptory challenges exercised by the prosecuting officer in excusing from the trial jury all qualified negro veniremen, solely because of his race or color?

VI

Summary of Argument.

Introduction.

Since the sovereign State of Michigan stands indicted in this Court upon the grave charge of denying due process to citizens accused of crime, it is important to remember that she is accompanied by strong presumptions of innocence, and it is not to be assumed that any of her officers have violated constitutional guarantees.

This is definitely not a case in which negroes were tried in an atmosphere of hostility, unrepresented by competent counsel, nor does it present the situation encountered in States where members of that race are treated as an 'oppressed minority'. [7]

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[7]

Public policy in Michigan, as declared by the legislature, recognizes fully the obligation of the 14th Amendment:

1. The school code provides that 'no separate school or department shall be kept for any person or persons on account of race or color' (2 Comp. Laws 1929, § 7368 [Stat. Ann. § 15.380]).

2. Our general insurance law prohibits any life insurance company from making any distinction or discrimination between 'white persons and colored persons, wholly or partially of African descent' (3 Comp. Laws 1929, § 12457 [Stat. Ann. § 24.293]).

3. The 'civil rights' chapter of Michigan's penal code, provides for full and equal accommodations to 'all persons' (Act No. 328, Pub. Acts 1931 [Stat. Ann. § 28.343]).

4. And § 148 of that chapter provides that 'no citizen . . . . . possessing other qualifications, ... shall be disqualified to serve as grand or petit jurors in any court . . . . . on account of race or color' . . . . . (Stat. Ann. § 28.345).

Petitioners were tried with other negroes, who were acquitted, and with many prominent white officials who with them and others were together convicted of the offense charged in the information.

As the trial court remarked (73-74), in denying a new trial (64-78), 'there was no color line or distinction drawn by the jury'.

Nor is there a satisfactory record of the number of peremptory challenges exercised by either side, which might indicate whether petitioners themselves challenged veniremen of their own race.

And, finally, the prosecuting attorney, in his opening statement (49) and closing argument (53), and the trial judge in his charge to the jury (53), cautioned them to decide the case on the facts, drawing no lines of race or color.

First: (Question 1). It will become clear upon consideration of the entire record and in contemplation of the federal question presented at this time, that petitioners, who were represented by some of the most capable counsel in their community, indulged afterthoughts when preparing their motions for new trial; that, although at 'the moment of contact', when the jury were being drawn, they had the matter in mind, [8] they were not sufficiently

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[8]

The petitions for certiorari (p. 3) aver that 'during this process (of drawing the jury) it became apparent that the prosecuting attorney was misusing the 325 peremptory challenges available to the people (unconstitutionally, petitioner claims) in pursuance of a premeditated and studied plan to obtain a jury of his own choosing and to bar all qualified negro veniremen from serving on the jury solely because of race'.

impressed by the supposed violation of their constitutional rights, to warrant a fervent protest, for they raised no objections at that crucial moment; and that, having been convicted by sufficient testimony, as found by the state supreme court, they then carefully combed the record to discover the constitutional point which they had overlooked; in short, they then sought to use constitutional guarantees as a club rather than as a shield.

We respectfully submit, in such circumstances, that the discretionary writ of certiorari should be denied.

Second: (Question 2). The affidavit upon which petitioners rely (62) falls far short of establishing any essential factor of racial discrimination, for it is quite evident that the prosecuting official was not guided by any racial prejudices which he might entertain, but that he was moved to exercise his lawful challenges, without assigning his reasons therefor, by the undisputed fact that both Roxborough and Watson, the defendants, were large-scale operators of numbers, policy and other illegal enterprises, that they employed great numbers of colored folk in their respective organizations, and that their illicit games of chance were patronized by members of their race.

Third: (Question 3). The State does not deny a negro charged with crime, due process or equal protection of the law, in the selection of a petit jury from a panel on which that race is represented, where, under a valid statute conferring mutual rights of peremptory challenge, both accuser and accused may reject a specified number of veniremen, without assigning reasons therefor.

This Court, in their decisions, have never upheld the claim of right to have members of one's own race upon a jury (see authorities cited in the argument which follows).

The core of the matter is, we think, found in one short sentence taken from the opinion of the supreme judicial court of New Hampshire in a case cited and relied upon by petitioners,

State v. Wilson, 48 N.H. 398, 399.

> "An *impartial* jury is all that the respondent is entitled to under the constitution. 'He cannot claim the right to be tried by a *partial* jury' ".

VII

Argument.

Point One

The discretionary writ of certiorari should be denied those who raised the federal question as an afterthought in moving for a new trial in the court of first instance.

The 'moment of contact', if any, between the Constitution and state officialdom, occurred (if it did, and this we deny) when the jury was being drawn from a panel which included qualified negro veniremen.

Petitioners concede, in their applications for certiorari (pp. 3-4), that 'during this process *it became apparent* that the prosecuting attorney was misusing the 325 peremptory challenges available to the people (unconstitutionally, petitioner claims) in pursuance of a premeditated and studied plan to obtain a jury of his own choosing and to bar all qualified negro veniremen from serving on the jury solely because of race'.

If, as petitioners aver (petitions, p. 3), this supposed violation of their constitutional rights, then 'became apparent', why did their counsel fail to protest in open court, or, if they did, why did they not, in settling their record on appeal, include therein a transcript of the voir dire examination?

While it is true that other counsel, representing respondents of the white race, filed a motion for mistrial on this ground (123-124), the petitioners, who were members of the African race, did not join therein, and they failed to file or otherwise make a similar motion.

The foregoing motion for mistrial, in behalf of white defendants, came shortly after the prosecuting attorney had closed his opening statement to the jury (see, original certified record, pp. 121-128).

When the prosecutor ended his statement (idem., 121), counsel for Roxborough (No. 98) rose to ask the trial judge to declare a mistrial, 'for this reason, after the opening statement made by the prosecutor, it is utterly impossible that these defendants may obtain a fair trial from this jury'.

He continued:

> "There are two statments made by the prosecutor, I don't know and don't want to say that they were intentional, they may have been inadvertence, that four of the defendants charged here have pleaded guilty".

And the point was urged by this counsel with great fervor, concluding thus (idem., p. 122):

> "I say that in view of that fact, that it is impossible to even cure or rid from the minds of the jury the fact that the four defendants who are not on trial have pleaded guilty to this offense, which will give rise, without question, to an inference that there is some degree of guilt attached to these other defendants".

The motion was denied (id., 122), and the jury were later instructed (id., 128-129) to disregard the prosecutor's offer of proof that other defendants had pleaded guilty. And it is to be remarked that counsel for Watson joined in this motion (id., 122).

Whereupon, counsel for respondents Rykman *et al.* presented their motion for mistrial (*supra*), and it was overruled (id., 128).

Counsel for petitioners, throughout these proceedings, maintained an absolute silence, and, although the opportunity was afforded them to protest, they raised no objections in respect of the people's peremptory challenges.

And this silence was maintained throughout a trial which lasted for upwards of two months; they did not call in question the procedure now complained of, when they moved for a directed verdict, or at the close of the case, or in their requests to charge, but they waited until they had been convicted, and until, after the lapse of weeks, they finally filed and presented a supplemental motion for a new trial.

While no one will dispute the fact that a court of law is the guardian of constitutional rights, it is also mere sportsmanship to expect that those who apprehend that those rights and privileges have been infringed will make timely protest, and, even when, at a much later stage of the proceedings, the constitutional rights are asserted, the State itself possesses some right itelf.

This trial, as we have noted, consumed over two months; hundreds of witnesses were sworn and testified; and it is obvious that, in the event of a new trial, the State might find it difficult, if not impossible, to reassemble its proofs, produce witnesses widely scattered, and, in this particular case, have the benefit of the service of counsel who have, meanwhile, entered other fields of professional endeavor. [9]

We, therefore, respectfully submit that, on this ground alone, the writ should be denied.

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[9]

The special assistant prosecuting attorney, who so ably represented the State in this case, has since become an honored member of the Wayne circuit court, and the assistant attorney general is now legal adviser to the governor of the State of Michigan.

Point Two

The affidavit, supporting Roxborough's supplemental motion for new trial, fails to establish racial discrimination.

Petitioners' claim that defendants of African racial descent were discriminated against (in violation of the equal protection clause of the 14th Amendment) is based upon an ex parte affidavit filed in support of Roxborough's supplemental motion for new trial (Watson did not raise the point in the court of first instance).

The affiant, John R. Williams, the editor of a weekly negro newspaper, relates a 'conference' (interview) which he says he had with the special assistant prosecuting attorney (outside the court room, apparently), during which Williams inquired how it happened that the prosecutor had continually for days excused only negro jurors who had been called for service (62).

We pause at this point long enough to observe that had the prosecutor been called as a witness in open court and asked this same question, he would not have been bound to reply unless commanded by the trial judge (who would have been in error in so doing). Nor was he bound to answer the reporter's question. It is, therefore, obvious that the alleged interview is of little, if any value as possessing probative force.

The prosecutor's reply to this question was as follows:

> "The Roxborough-Watson interest (s) are so wide that I prefer that I do not have any negroes on the jury and further practically every negro in Detroit is a number or policy player anyhow, and as such is unfit to serve on a case involving such matters".

Assuming that the motive of the prosecuting attorney may be made the subject of judicial inquiry, and assuming that the exercise of lawful peremptory challenges may in any circumstances form the basis of a claim that equal protection of the laws has been denied, we respectfully submit it is clear, in view of the authorities hereafter cited, that the affidavit (62) falls far short of establishing the essential factors of racial discrimination prescribed by the 14th Amendment.

Since petitioners Roxborough and Watson admittedly conducted illegal enterprises patronized by members of their race, and employed others of that group in their respective organizations, they should not be heard to complain of the exercise of peremptory challenges by the prosecution, for the purpose of eliminating from the jury those veniremen deemed to be prejudiced, and there is no evidence that the prosecutor excused such talesmen '*solely* because of their race or color'.

The affidavit of a newspaper reporter who alleges he obtained an interview with the prosecutor, does not prove, by any means, that members of the colored race were arbitrarily and systematically excluded from jury service, through deliberate design, much less '*solely because of their race or color*'. It utterly fails to show or indicate racial prejudice in the mind of the prosecutor, since his specific reasons for rejecting negro veniremen

rested on other and distinct grounds. Nor does it disclose any meretricious motives. It merely shows, if it proves anything, that members of the colored race were rejected, not 'solely because of their race or color', but because of the connections of Roxborough and Watson.

Point Three

There is no substance in the claim that exercise of the State's peremptory challenges violated any constitutional guarantees.

Our position may be stated thus:—since selection of a jury panel by commissioners who arbitrarily reject all those of a certain race, is not presently involved, and the right to exercise peremptory challenges is clear, and since a negro charged with crime possesses no fundamental right to a mixed jury, no constitutional privileges were infringed in the trial of these petitioners.

There is no claim here that negroes were systematically and arbitrarily excluded from the jury panel of Wayne county, indeed it would appear that more than 30 members of that race were on the panel from which the jury was chosen in this cause. The complaint is that such negroes were eliminated through peremptory challenges exercised by the prosecuting official.

The right accorded the State by its legislature, [10] as

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[10] Mich. Code of Criminal Procedure, Chap. 8, § 12 (3 Comp. Laws 1929, § 17305 [Stat. Ann. § 28.1035]).

well as the privilege granted accused persons by the same law, is founded on sound public policy,

> *United States v. Marchant,* 25 U.S. (12 Wheat.) 480, 482.

> "Experience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, *from his habits and associations* (emphasis supplied), and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted",

> *Hayes v. Mississippi,* 120 U.S. 68, 70.

See, also,

> *Spies v. United States,* 123 U.S. 131,
> *Pointer v. United States,* 151 U.S. 396.

Thus it becomes clear that whatever may motivate state or defense counsel, their reason for exercising a peremptory challenge is immaterial because under the law such a right may be exercised

> "according to the judgment, will, or caprice of the party entitled thereto without assigning any reason therefor, or being required to assign a reason therefor . . . . The right is not intended to enable a party to select particular juries but merely to exclude from the panel objectionable persons whom he is unable

> successfully to challenge for cause, or, as ordinarily expressed, the right is not to select but to reject .... Within the number allowed by law the right is absolute, and cannot be abridged or denied by any arbitrary rule of court as to the mode of impaneling a jury",
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> 35 C.J. 405.

The question for decision is controlled by principles laid down by this Court shortly after ratification of the 14th Amendment (1868),

> *Strauder v. West Virginia* (1879), 100 U.S. 303,
> *Virginia v. Rives* (1879), 100 U.S. 313,
> *Ex Parte Virginia* (1879), 100 U.S. 339.

From those decisions (and many that followed), it clearly appears that the 'equal protection clause' of the 14th Amendment confers upon a negro charged with crime, no absolute fundamental right to have negroes on grand or petit jury, and it comes into play only when the accused can establish the fact that all members of his race are, through deliberate design, systematically and arbitrarily excluded from jury services, solely because of their race or color.

Once the members of a race are (both in law and administrative practice) given the right to representation on the jury lists, the constitutional guarantee of 'equal protection' is fulfilled by the State.

It logically follows that the States violates no constitutional guarantee found in the 14th Amendment, when,

under even-handed provisions of a code of criminal procedure, both accuser and accused may, without assigning reason or motive therefor, reject a prescribed number of talesmen in the exercise of lawful peremptory challenges (Code of Criminal Procedure, Chap. 8, § 12 [3 Comp. Laws 1929, § 17305 (Stat. Ann. § 28.1935)]).

And we respectfully submit that if there exists any valid reason for such exclusion, whether resident in the mind of the prosecutor or openly disclosed to the press, peremptory challenges so exercised do not violate the 'equal protection clause' of the 14th Amendment.

First: That this Court have in such cases applied the 'equal protection clause' only when it manifestly appears that a State has singled out and denied to colored citizens the right and privilege of participating in the administration of the law, as jurors, solely because of their color, though qualified in all other respects, clearly appears from their decisions which culminated in *Norris v. Alabama*, 294 U.S. 587 (discussed in our first brief, 191, 196).

And counsel has succeeded in finding no decision of the highest court in which it has been held that the 'equal protection clause' of the 14th Amendment in the slightest degree restricts a lawful right (given by the legislature) to reject through exercise of peremptory challenge any member (white or colored) of a mixed jury panel.

The case of *Norris, supra*, though given considerable publicity, rested on fundamental principles declared by the court shortly after ratification of the 14th Amendment in 1868.

In the leading case of *Strauder v. West Virginia, supra* (100 U.S. 303), a colored man indicted for murder moved the trial court to quash *venire* 'because the law under which it was issued was unconstitutional' (in conflict with the recently ratified 14th Amendment), and, on that ground, also sought removal of the cause to the circuit court of the United States (under the Federal 'civil rights' law [Rev. Stat. § 641]).

The law of the State to which reference was made (Acts of West Virginia, 1872-73, p. 102) provided:

> "All *white* male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided".

On appeal from the supreme court of appeals (who affirmed conviction), the underlying question defined by the supreme court of the United States, was 'whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury *selected and impanelled* without discrimination against his race or color, because of race or color'.

It was observed, however, at the very outset of the opinion (p. 305),

> "that the first of these questions is not whether a colored man, when an indictment has been performed against him, has a right to a grand or petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is indicted or tried, all

> persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury''.

The questions were important (said the court) 'for they demand a construction of the recent amendments of the Constitution'. The Fourteenth Amendment 'was designed to assure to the colored race the enjoyment of all the civil rights that under the laws are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States'.

> ''What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?''

And the court then consider the effect of the law under scrutiny (p. 308):

> ''That the West Virginia statute respecting juries —the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted .... The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of law, as jurors, because of their color, though they are citizens, may be in other respects fully qualified, is practically a brand

upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others".

. . . . .

"(p. 309) . . . It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. . . . And how can it be maintained that compelling a colored man to submit to a trial for his life *by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone,* however well qualified in other respects, is not a denial to him of equal legal protection?" [Emphasis supplied].

In determining the limits of such protection, however, one should carefully consider the decision that immediately followed,

Virginia v. Rives, 100 U.S. 313.

The court, in that case, granted writ of *mandamus* commanding the judge of the district court (of the United States) of the western district of Virginia 'to cause to be re-delivered by the marshal of said district the bodies of' two colored men, one of whom had been convicted and sentenced for the crime of murder in the state court. In the other case the jury had disagreed.

It appeared that some time prior thereto, these men had been jointly tried and convicted, and the judgments set aside by the state court.

When this joint trial was held, the defendants moved the court that the *venire,* which was composed entirely of the white race, be modified so as to allow one-third to be composed of colored men, but this motion was overruled on the ground that the court 'had no authority to change the *venire,* it appearing (as the record stated) to the satisfaction of the court that the *venire* had been regularly drawn from the jurybox according to law'.

Thereupon, the defendants, before the trial, filed their petition, duly verified, praying for a removal of the case into the circuit court of the United States for the western district of Virginia.

That petition alleged, among other things, that 'by the laws of Virginia all male citizens, twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and the laws of the state, are made liable to serve as jurors; that this law allows the right, as well as requires the duty, of the race to which petitioners belong to serve as jurors; yet that the grand jury who found the indictment against them, as well as the jurors summoned to try them, were composed entirely of the white race'.

The state court denied this prayer, and proceeded with the trial, when each of the defendants was convicted. The verdicts and judgments were, however, set aside, and a motion for the removal of the case was renewed, and again denied. The defendants were then tried separately,

one was convicted, and in the other case the jury disagreed.

> "In this stage of the proceedings a copy of the record was obtained, the cases were, upon petition, ordered to be docketed in the circuit court of the United States, ... and a writ of *habeas corpus cum causa* was issued, by virtue of which the defendants were taken . . . . into the custody of the United States marshal".

This Court held, in substance, that section 641 of the Revised Statutes (the 'civil rights act', so-called) did not require removal of a criminal case from a state to a Federal court, in such circumstances.

The important phase of the decision, however, deals with the claim that the defendants were entitled to a mixed jury:

> "Nor did the refusal of the court and of the counsel for the prosecution to allow a modification of the *venire,* by which one-third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them, or to any person, by the law of the state, or by an act of Congress, or by the Fourteenth Amendment of the Constitution. It *is* a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or

property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the state court, viz., a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by the Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment, or with the purview of sect. 641''.

Cf. *Ex Parte Virginia*, 100 U.S. 339.

At the next term of court (October 1880), it was held that 'the exclusion, because of their race and color, of citizens of African descent from the grand jury that found, and from the petit jury that was summoned to try, the indictment, *if made by the jury commissioners, without authority derived from the Constitution and laws of the State,* was a violation of the prisoner's right under the Constitution and laws of the United States, which the trial court was bound to redress' (Syl. 6), and that 'upon the showing made by the prisoner, the motions to quash the indictment and the panels of jurors should have been sustained', (Syl. 7),

Neal v. Delaware, 103 U.S. 370.

The general principle laid down in the case of *Neal, supra,* and followed in

Carter v. Texas, 177 U.S. 442, 447,

constitutes the underpinning of the decision rendered by the court in *Norris v. Alabama, supra* (294 U.S. 578). [11]

In *Martin v. Texas* (1905), 200 U.S. 316, the court again observed that an accused person cannot of right demand a mixed jury some of which shall be of his own race, nor is a jury of that kind guaranteed by the 14th Amendment.

Furthermore, it was said, in that case, that, while an accused person of African descent on trial in a state court is entitled under the Constitution of the United States to demand that '*in organizing the grand jury, and empanelling the petit jury,* there shall be exclusion of his race on account of race and color, such discrimination cannot be established by merely proving that no one of his race was on either of the juries; and motions to quash, based on alleged discriminations of that nature, must be supported by evidence introduced or by an actual offer of proof in regard thereto''.

To the same effect,

Thomas v. Texas, 212 U.S. 278.

It is plain that the case at bar does not come within

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[11]

"Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, and equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States", Carter v. Texas, supra.

the general principles declared by Mr. Chief Justice Hughes in

Norris v. Alabama, 294 U.S. 587,

when he said:

> "Summing up precisely the effect of earlier decisions of this court thus stated in *Carter v. Texas*, 177 U.S. 442, 447, in relation to exclusion from service on grand juries: 'Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied him' . . . . The principle is equally applicable to a similar exclusion of negroes from service on petit juries".

The facts involved at bar are not comparable to those considered by this Court in the case of *Norris*, for there, although the population of Morgan county, Alabama, in 1930 was 46,176, and of this number 8,311 were negroes, the Court observes:

> "Within the memory of witnesses, long resident there, no negro had ever served on a jury in that county or had been called for such service".

The *Norris* case was followed in

Hollins v. Oklahoma, 295 U.S. 394,

Where it is held that evidence sustained the contention that 'negroes *for a long period of time* had been excluded from jury service . . . . . *solely* on account of their race or color'. [Emphasis, ours].

Adhering to the principles laid down in former cases, including *Norris v. Alabama, supra,* the court, in

Hale v. Kentucky, 303 U.S. 613,

say:

> "We are of the opinion that the affidavits, which by the stipulation of the State were to be taken as proof, and were uncontroverted, sufficed to show *a systematic and arbitrary exclusion of negroes from the jury lists solely because of their race or color,* constituting a denial of the equal protection of the laws guaranteed to petitioner by the Fourteenth Amendment". [Emphasis supplied].

In *Pierre v. Louisiana* (1938), 306 U.S. 354, it is held that 'when the jury commissioners of a state court *intentionally and systematically* exclude negroes from among the persons *summoned and listed for jury service,* an indictment for murder, returned against a negro by a grand jury *drawn or selected* from such lists, is void under the equal protection clause of the Fourteenth Amendment'. [Emphasis supplied].

And in *Smith v. Texas* (1940), 311 U.S. 128, reversing the conviction of a negro upon an indictment returned by the grand jury of a county in which, at the time of such return and long prior thereto, 'negroes were intentionally and systematically excluded from grand jury service,

solely on account of their race and color', the Court, speaking through Mr. Justice Black, say:

> "Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list".

We have observed that counsel for appellant at bar have failed to cite any authority holding that the equal protection clause of the 14th Amendment may be violated through exercise of the lawful right of peremptory challenge.

Our research discloses but one case on this particular point, and that decision runs contrary to appellants' contention.

> *Whitney v. State*, (1901), 43 Tex. Cr. 197, 63 S.W. 879.

In harmony with the cases decided by this Court (from *Virginia v. Rives*, 100 U.S. 313, to and including the most recent of that time, *Carter v. Texas*, 177 U.S. 442) the Texas court held that 'on the issue of race discrimination, a negro on trial is not entitled, under the law, to such representation on the grand jury as the *pro rata*

of the negro race of the county bears to the *pro rata* of the white race in said county' (Syl. 2), and 'it was never intended by the Fourteenth Amendment to the Constitution of the United States to guarantee a negro defendant a full negro grand jury nor any particular number of grand jurors; but the intention was to prevent the intentional exclusion of negroes from the grand jury solely because of their race or color and thus deny an equal protection of law, in a criminal prosecution, of a person of the African race'.

The Court close their opinion by considering the question raised at bar:

> "We do not understand that any motion was made on the part of appellant to quash or abate the special *venire* summoned to try the case. It appears in the motion for new trial that there was three negroes on the panel to try defendant, *and these were peremptorily challenged by the State.* This, under our statute, the State had a perfect right to do without assigning any reason; *nor do we understand that this could be construed into any discrimination against the negro race. To so hold would be equivalent to guaranteeing a negro defendant a certain number of negroes on the jury to try him. We do not understand this to be the construction of the Fourteenth Amendment by the supreme court of the United States*".

Petitioners' counsel argue that, since the provisions of our code of criminal procedure, as applied at bar, give to the State the unfair advantage of 325 peremptory challenges exercised by the prosecuting attorney in a

case involving 65 defendants, to five peremptory challenges granted each of the petitioners (the accused); therefore, the statute, as applied, denies equal protection of the laws.

Laying aside the controlling fact that the constitutionality of this statute was not called in question in the court below until an application for rehearing was presented,[12] it would appear that these petitioners were accused with having conspired with 64 (or more) other defendants; that, with 22 others, they were convicted of such a conspiracy. If they chose to associate themselves with a large number of other persons in the one criminal enterprise, the fault of numbers is theirs and they must abide the consequences.

Moreover, the petitioners, although fully aware of the fact that they were jointly indicted with a large number of other persons, did not move the court to grant them a separate trial.

This right was statutory, the code providing that

> "when two [2] or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court",
>
> Code of Criminal Procedure, Chap. 8, § 5 (3 Comp. Laws 1929, § 17298 [Stat. Ann. § 28.1028]).

Thus it is manifest that petitioners 'slept on their rights' from the time the information was filed and un-

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[12] Herndon v. Georgia, 295 U.S. 441.

til one of them (Roxborough) filed his supplemental motion for a new trial; their counsel were somnolent when the opportunity to move for a separate trial went by, and when it 'became apparent' that constitutional rights were in jeopardy.

We respectfully submit that the result of petitioners' criminal association with members of a large group (though 65 in number), and their failure to assert their rights, should not now be charged against the people of the State of Michigan.

VIII

Conclusion

For the reasons assigned in our summary of the argument, and elsewhere in this brief, we respectfully submit that the pending applications should be denied.

Respectfully submitted,

Herbert J. Rushton
Attorney General for the State of Michigan

Daniel J. O'Hara
Assistant Attorney General for the State of Michigan
Counsel for Respondent

Edmund E. Shepherd
Solicitor General for the State of Michigan
(*Of Counsel*, on the Brief)

(34)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 98

JOHN W. ROXBOROUGH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

PETITION FOR REHEARING

CHARLES H. HOUSTON,
GEORGE STONE,
Counsel for Petitioner.

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OCTOBER TERM, 1944

No. 98

JOHN W. ROXBOROUGH,

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vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Petitioner respectfully requests a rehearing on the Petition for Writ of Certiorari heretofore filed by him, and suggests that further consideration be given to the following reasons for the issuance of the writ:

Statement

Petitioner, a Negro, was convicted in the Circuit Court for Wayne County, Michigan, on a charge of conspiracy to obstruct justice. He and 79 other identified persons were jointly charged with the crime, and petitioner and 64 of these 79 were tried jointly (R. 23).

Under the laws of the State of Michigan, Section 17305, Compiled Laws of 1929, the prosecutor had available to him 5 peremptory challenges for each defendant on trial—a staggering total of 325 such challenges. Each defendant, on the other hand, had but 5 peremptory challenges. The interests of the defendants were diverse and frequently conflicting, even hostile, and they were represented by 16 different lawyers (R. 48), thus effectively precluding any agreement or unified action relating to challenges.

During the selection of the trial jury, which took a period of about 3 weeks, the prosecutor used upwards of 100 of his challenges. All Negroes selected, at least 30 in number, although presumptively qualified, were arbitrarily and peremptorily excluded by the prosecutor's use of this overwhelming advantage of the 325 peremptory challenges at his disposal, on the ground of race prejudice, admitted by the prosecutor, as appears from the Williams affidavit, obtained February 18, 1942, and filed the next day in support of motion for new trial. That affidavit, nowhere controverted or explained by the state, quotes the prosecutor's explanation for his excluding, peremptorily, the 30 Negroes, as (R. 62):

> "A. The Roxborough-Watson interests are so wide that I prefer not to have any Negroes on the jury, and further practically every Negro in Detroit is a number or policy player anyhow, and as such is unfit to serve on a case involving such matters. * * *"

Suspicion that the prosecutor was actuated by racial prejudice in peremptorily challenging every Negro venireman called to serve on the trial jury, could not be verified until the Williams affidavit was obtained on February 18, 1942. It was immediately, in fact on the very next day, filed with the trial court (R. 62) and the objection vehemently pressed. The trial court, after argument, overruled petitioner's contention (R. 73-4).

On appeal to the State Supreme Court, the prejudicial conduct of the prosecutor in his misuse of the 325 peremptory challenges was assigned as error, as an invasion of his constitutional rights, and the point pressed in the briefs. The State Supreme Court took full cognizance of the issue, discussed it at considerable length, but affirmed the action of the trial court. (See Appendix B hereto.)

In due course, petitioner filed application in this court for writ of certiorari to review the affirmance by the State Supreme Court. Application was denied on October 16, 1944. The State Supreme Court, on October 17, 1944, granted petitioner a further stay of proceedings for 30 days, to enable him to file this petition for rehearing. A certified copy of the stay order has been filed with the Clerk of the court, and a copy is inserted herein as Appendix "A".

Reasons

I

There can be no doubt that petitioner's constitutional right to equal protection of the laws as guaranteed by Section 1 of the 14th Amendment was outrageously violated and that he was placed on trial before a jury hand-picked by the prosecutor through the misuse of his reservoir of 325 peremptory challenges to exclude all Negro veniremen solely because of race. Here the traditional function of the peremptory challenge *to exclude* became by cumulative and repetitive use *the power to select.*

Cf. State v. *Wilson,* 48 N. H. 398, at 399.

Whether or not the constitutional question here involved was properly raised in the trial court (and we claim that it was) is immaterial inasmuch as the Supreme Court of the State of Michigan, the highest court of that State, did consider and decide that question on its merits.**

** See Appendix "B".

See 307 Mich. 575, at pages 588-594.

The action of the State Supreme Court in thus considering and disposing of petitioner's claim of violation of his constitutional rights, amounts to a waiver of petitioner's inartistic presentation of the issue to the trial court, so that he is now entitled to review by this Court.

Home Insurance Co. v. *Dick,* 281 U. S. 397, 74 L. Ed. 926.

Whitfield v. *Ohio,* 297 U. S. 431, 80 L. Ed. 778.

The manner in which the objection was presented is immaterial, so long as the State Supreme Court was not misled. Inexpertness in drawing the question does not preclude review of a constitutional right.

Pyle v. *Kansas,* 317 U. S. 213, 87 L. Ed. 214.

II

The lodging of 325 peremptory challenges in the prosecution, by virtue of Section 17305 of the Compiled Laws of 1929 of the State of Michigan, enabled him to obtain a hand-picked jury from the total panel of 300 veniremen. By the exercise of 100 of those challenges, he succeeded in obtaining a jury of his own choice.

The selection of a trial jury with the participation of the prosecutor has always been condemned because "an impartial trial would seldom occur unless the selection of the jury be impartial."

Peak v. *State,* 50 N. J. L. 179.

Trial by a jury not impartially selected is a denial of due process and equal protection of law under the Fourteenth Amendment to the Constitution of the United States.

Smith v. *Texas,* 311 U. S. 126, 85 L. Ed. 84.

Carter v. *Texas,* 177 U. S. 442, 44 L. Ed. 839.

The case at bar presents the additional important circumstance that the prosecutor used as many of the 325 peremptory challenges as were necessary to strike from the trial jury every Negro called. The Williams affidavit presented to the trial court showed that this action was taken by the prosecutor for the reason that he believed "every Negro in Detroit is a number or policy player anyhow, and as such is unfit to serve on a case involving such matters" (R. 63).

The opinion of the State Supreme Court that this affidavit did not disclose a racially discriminatory purpose on the part of the prosecutor, effectuated by his misuse of the 325 peremptory challenges so generously given to him, is contrary to reason and justice.

See 307 Mich., at page 594.

This Court is not bound by the findings of fact of the State Court where effective review requires that this Court inquire both into the facts and the law.

Norris v. *Alabama*, 294 U. S. 587, 589-590, 79 L. Ed. 1074.

The Williams affidavit was not contradicted, contraverted or explained in any way. The burden of overcoming its accusation was upon the State, and its failure to do so is ground for inference that the accusation was true.

Cf. Hill v. *Texas*, 316 U. S. 400, 405, 86 L. Ed. 1559.

In the circumstances of this case, the misuse by the prosecutor of the 325 peremptory challenges to discriminate against petitioner's rights, and totally and arbitrarily to exclude every available Negro from the trial jury was a denial to petitioner of due process and equal protection of the law guaranteed to him by the Fourteenth Amendment.

Smith v. *Texas, supra.*

Carter v. *Texas, supra.*

The mere fact that the statute authorized the prosecutor to exercise 325 peremptory challenges is insufficient to overcome the constitutional objections. The application and administration of that statute have resulted in the deprivation of petitioner's rights, and are thus equally condemned by the Constitution.

Smith v. *Texas, supra.*

Moreover, although a state is free to dispense with trial by jury, if it sees fit to do so, it does not follow that it may substitute a jury chosen with the participation of the prosecutor.

Brown v. *Mississippi,* 297 U. S. 278, 80 L. Ed. 682.

Conclusion

The fundamental principle of the Constitution is that ours shall be a government by law and not by men. Lodging 325 peremptory challenges with the prosecutor, which he can and did use without restraint of law, against 5 peremptory challenges at the disposal of petitioner, *ipso facto,* destroyed that equilibrium which is inherent in our administration of justice as embodied in our constitutional standards of due process and equal protection.

That power, thus given to the prosecutor, becomes doubly abhorrent when misused, as in the present case, to successfully effectuate a discrimination against the Negro race, and infect the trial with race prejudice. Ordinarily, lack of proof might impose an insuperable barrier to relief against this abuse of power by the prosecutor, because he cannot be examined on his reasons for exercising his peremptory challenges. But in this instance, we have the gratuitous confession from the prosecutor's own lips that race prejudice was the ground for his peremptory exclusion of every Negro venireman.

We repeat our position taken in our original petition that the very novelty of the discrimination practiced in this case should lead this court to outlaw it before it becomes established as an effective subterfuge for evading constitutional restraints.

Petitioner respectfully prays that this court reconsider his petition for certiorari, and upon such reconsideration grant the writ.

Respectfully submitted,

CHARLES H. HOUSTON,
615 F Street, N. W.,
Washington 4, D. C.;
GEORGE STONE,
2163 Penobscot Bldg.,
Detroit 26, Michigan,
Attorneys for Petitioner.

Certificate of Counsel

I hereby certify that I am one of the attorneys of record for petitioner in the foregoing petition for rehearing, and that I believe that there is just merit in this case. This petition is presented in good faith, and not for delay.

CHARLES H. HOUSTON.

APPENDIX "A"

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the seventeenth day of October, in the year of our Lord one thousand nine hundred and forty-four.

Present the Honorable Walter H. North, Chief Justice; Raymond W. Starr, Howard Wiest, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Associate Justices.

42085

THE PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff*,

vs.

JOHN W. ROXBOROUGH, *Defendant*

In this cause a petition is filed for the allowance of an order staying proceedings, and due consideration thereof having been had by the Court, It is ordered that all proceedings in said cause be stayed for a period of thirty days from and after this date to enable defendant to file a petition for rehearing in the United States Supreme Court in connection with his application for a writ of certiorari.

STATE OF MICHIGAN, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of October, in the year of our Lord one thousand nine hundred and forty-four.

JAY MERTZ,
Clerk.

[SEAL.]

APPENDIX "B"

The State Supreme Court, in its opinion, said, 307 Mich., at 588:

> "The next question raised by Roxborough is stated as follows:
>
> 'Where the prosecution excludes from a trial jury, solely because of race, every Negro selected, has a Negro defendant been deprived of due process and equal protection of the laws?'
>
> "Because of the importance of this question, we quote *in extenso* from appellant's brief as follows: * * *"

(35)

SUPREME COURT OF THE UNITED STATES

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No. 99

EVERETT I. WATSON,

Petitioner,

vs.

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> "A. The Roxborough-Watson interests are so wide that I prefer not to have any Negroes on the jury, and further practically every Negro in Detroit is a number or policy player anyhow and as such is unfit to serve on a case involving such matters * * *."

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[1] See Appendix "B".

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In the circumstances of this case, the misuse by the prosecutor of the 325 peremptory challenges to discriminate against petitioner's rights, and totally and arbitrarily to exclude every available Negro from the trial jury was a denial to petitioner of due process and equal protection of the law guaranteed to him by the Fourteenth Amendment.

Smith v. *Texas, supra;*

Carter* v. *Texas, supra.

The mere fact that the statute authorized the prosecutor to exercise 325 peremptory challenges is insufficient to overcome the constitutional objections. The application and administration of that statute have resulted in the deprivation of petitioner's rights, and are thus equally condemned by the Constitution.

Smith v. *Texas, supra.*

Moreover, although a state is free to dispense with trial by jury, if it sees fit to do so, it does not follow that it may substitute a jury chosen with the participation of the prosecutor.

Brown v. *Mississippi,* 297 U. S. 278, 80 L. Ed. 682.

Conclusion

The fundamental principle of the Constitution is that ours shall be a government by law and not by men. Lodging 325 peremptory challenges with the prosecutor, which he can and did use without restraint of law, against 5 peremptory challenges at the disposal of petitioner, *ipso facto,* destroyed that equilibrium which is inherent in our administration of justice as embodied in our constitutional standards of due process and equal protection.

That power, thus given to the prosecutor, becomes doubly abhorrent when misused, as in the present case, to successfully effectuate a discrimination against the Negro race, and infect the trial with race prejudice. Ordinarily, lack of proof might impose an insuperable barrier to relief against this abuse of power by the prosecutor, because he cannot be examined on his reasons for exercising his peremptory challenges. But in this instance, we have the gratuitous confession from the prosectuor's own lips that a race prejudice was the ground for his peremptory exclusion of every Negro venireman.

We repeat our position taken in our original petition that the very novelty of the discrimination practised in this case should lead this court to outlaw it before it becomes established as an effective subterfuge for evading constitutional restraints.

Petitioner respectfully prays that this court reconsider his petition for certiorari, and upon such reconsideration grant the writ.

Respectfully submitted,

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Attorneys for Petitioner.

Certificate of Counsel

I hereby certify that I am one of the attorneys of record for the petitioner in the foregoing petition for rehearing, and that I believe that there is just merit in this case. This petition is presented in good faith, and not for delay.

CHARLES H. HOUSTON.

APPENDIX "A"

At a session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the seventeenth day of October, in the year of our Lord one thousand nine hundred and forty-four.

Present the Honorable Walter H. North, Chief Justice; Raymond W. Starr, Howard Wiest, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Associate Justices.

42089

THE PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff*,

vs.

EVERETT I. WATSON, *Defendant*

In this cause a petition is filed for the allowance of an order staying proceedings, and due consideration thereof having been had by the Court, it is ordered that all proceedings in said cause be stayed for a period of thirty days from and after this date to enable defendant to file a petition for rehearing in the United States Supreme Court in connection with his application for a writ of certiorari.

STATE OF MICHIGAN, SS.:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of October, in the year of our Lord one thousand nine hundred and forty-four.

Jay Mertz, Clerk. (Seal.)

APPENDIX "B"

The State Supreme Court, in its opinion in the companion case, *People* v. *Roxborough*, 307 Mich. 575, incorporated into petitioner's case, 307 Mich. 596, 609, said (307 Mich. 588):

> "The next question raised by Roxborough is stated as follows:
>
> 'Where the prosecution excludes from a trial jury, solely because of race, every Negro selected, has a Negro defendant been deprived of due process and equal protection of the laws?'
>
> "Because of the importance of this question, we quote *in extenso* from appellant's brief as follows: * * *"